

United States
Court of Appeals
for the Ninth Circuit

PUGET SOUND PULP AND TIMBER CO., a
corporation, and LAWSON TURCOTTE,
Appellants,

vs.

JOE A. O'REILLY, Appellee.

JOE A. O'REILLY, Appellant,

vs.

PUGET SOUND PULP AND TIMBER CO., a
corporation, and LAWSON TURCOTTE,
Appellees.

Transcript of Record

Appeal from the United States District Court for the Western
District of Washington, Northern Division

FILED

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No. 14906

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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District of Washington, Northern Division

No. 125

JOE A. O'REILLY, Plaintiff,

VS.

PUGET SOUND PULP & TIMBER CO., a corporation; and LAWSON TURCOTTE,
Defendants.

COMPLAINT

Comes now plaintiff and for cause of action against the defendants alleges:

I.

That plaintiff is a citizen and resident of the State of California.

II.

That defendant, Puget Sound Pulp & Timber Co., is a private corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal office and place of business in Bellingham, Washington, within the jurisdiction of this court; that the defendant, Lawson Turcotte is a citizen and resident of the State of Washington residing in Bellingham, Washington within the jurisdiction of this court.

III.

That the matter in controversy herein exceeds, exclusive of interest and costs, the sum of three thousand dollars.

IV.

That on or about the 22nd day of May, 1946, plaintiff and defendant, Puget Sound Pulp & Timber Co. entered into a contract in writing, a true copy of which is attached hereto as Exhibit "A", and, by this reference, made a part hereof as though the same were fully set forth herein.

V.

That on or about the 25th day of May, 1946, the corporation to be organized, pursuant said contract, to-wit: Bellingham Paper Products Company, was in fact organized as a Washington corporation immediately upon the execution of said Exhibit "A" and its stock issued as contemplated by said agreement.

VI.

That also pursuant to said Exhibit "A" Bellingham Paper Products Company, a corporation, and plaintiff entered into a contract in writing in June, 1946, a true copy of which is attached hereto as Exhibit "B", and, by this reference, made a part hereof as though the same were fully set forth herein.

VII.

That in the latter part of 1947, the defendant Puget Sound Pulp & Timber Co. purchased all of the assets, liabilities and capital stock of the Bellingham Paper Products Company and thereafter, in December, 1947, commenced to dissolve said corporation, completing the dissolution thereof on March 13, 1948; that Puget Sound Pulp & Timber

Co. succeeded to all of the rights, duties and obligations of the said Bellingham Paper Products Co.; that the operations of said Bellingham Paper Products Company were integrated into the operation of Puget Sound Pulp & Timber Co. and became thereafter known as the "Paperboard Division" of the said Puget Sound Pulp & Timber Co.

VIII.

That plaintiff fully performed all of the conditions and obligations of said contracts, Exhibits "A" and "B", from the inception of said contracts down to and including the 28th day of February, 1952, upon which date said contracts were mutually terminated by the parties thereto; that defendant, Puget Sound Pulp & Timber Co., and its predecessor, Bellingham Paper Products Company, fully performed said agreements from their inception down to and including the 31st day of December, 1948, paying plaintiff 3% of net sales of said Paperboard Division during said period in accordance with the terms of said contracts; that from and including the 1st day of January, 1949, down to and including the 28th day of February, 1952, defendant, Puget Sound Pulp & Timber Co. paid unto plaintiff the gross sum (before income tax withholding, old age benefit and other deductions) of \$59,572.04, which sum represents 11½% of net sales of said Paperboard Division during said period; that pursuant to said contracts, defendant, Puget Sound Pulp & Timber Co. became indebted to plaintiff during said period in the total sum of \$119,144.08,

said sum being 3% of net sales of said Paperboard Division during said period.

That by reason of the foregoing defendant, Puget Sound Pulp & Timber Co. is indebted to plaintiff in the sum of \$59,572.04, together with interest thereon at the legal rate from and after the respective dates upon which each of said monthly payments became due.

For a second cause of action, plaintiff alleges:

I.

Plaintiff re-alleges paragraphs I through VIII of his first cause of action.

II.

That at all times herein mentioned, the State of Washington had enacted and there was in full force and effect laws of 1941, Chapter 72, Section 1 (RCW 49.52.050) and laws of 1939, Chapter 195, Section III (RCW 49.52.070) making it unlawful for any employer or for any officer, vice-principal or agent of such employer to willfully and with intent to deprive any employee of any part of his wages to pay such employee a lower wage than the wage such employer is obligated to pay such employee by contract, and providing for exemplary damages for twice the amount of the wages so withheld and for reasonable attorney's fees and costs in the event of a violation of said act.

III.

That at all times herein mentioned, the defendant, Lawson Turcotte, was an officer, vice-principal and

agent of the defendant, Puget Sound Pulp & Timber Co., plaintiff's employer as aforesaid; that said Lawson Turcotte and the defendant, Puget Sound Pulp & Timber Co. and each of them willfully and with intent to deprive plaintiff of a part of his wages as aforesaid, paid plaintiff gross wages of \$59,572.04, for the period January 1, 1949 to February 28, 1952, both dates inclusive, when the gross wages due plaintiff for said period, pursuant to his contract with said employer, was the sum of \$119,-144.09, all in violation of the statutes in such cases made and provided.

IV.

That a reasonable attorney's fee herein is the sum of \$30,000.00.

For a third but alternative cause of action, plaintiff alleges:

I.

Plaintiff realleges Paragraphs I through VIII of his first cause of action and Paragraphs I through IV of his second cause of action.

II.

That between the inclusive dates January 1, 1949 and February 28th, 1952, defendant Puget Sound Pulp & Timber Co. and Lawson Turcotte became indebted to plaintiff in the sum of \$208,716.12, exclusive of interest, for money had and received by said defendants for the use and benefit of and for the account of plaintiff; that no part of said sum has been paid although demanded.

Wherefore, plaintiff prays that he have judgment,

1. Against the defendant Puget Sound Pulp & Timber Co., on his first cause of action in the sum of \$59,572.104, together with interest thereon from and after the respective dates when each of said payments became due at 6% per annum, and

2. Against the defendants, Puget Sound Pulp & Timber Co. and Lawson Turcotte, and each of them, on his second cause of action in the sum of \$119,-144.08, together with interest thereon at the legal rate as aforesaid and a reasonable attorney's fee in the sum of \$30,000.00, and,

3. Against the defendants Puget Sound Pulp & Timber Co. and Lawson Turcotte and each of them, on his third cause of action in the sum of \$208,-716.12, together with interest as aforesaid, in the alternative, however, and in the event plaintiff's prayer for relief on his first or second cause of action or either of them, is denied, and

4. For his costs and disbursements taxable herein and for such other and further relief as the premises warrant.

/s/ KENNETH J. SHORT
RUMMENS, GRIFFIN, SHORT &
CRESSMAN and MAX BERNBAUM
Attorneys for Plaintiff

EXHIBIT "A"

Agreement

It is agreed between the Puget Sound Pulp and Timber Co., a Delaware corporation, as first party, and Joe A. O'Reilly, whose business address is 2611

Pacific Avenue, Tacoma, Washington, as second party, as follows:

(1) A corporation named Bellingham Paper Products Company, with its principal place of business in Bellingham, Washington, shall be organized under the laws of the State of Washington, for the purpose of engaging in manufacturing business, said corporation to have an authorized capital of \$200,000.00, represented by 2,000 shares of non par common stock; said corporation to be governed by a board of five directors. The incorporators of the new corporation shall be Lawson Turcotte, Joe A. O'Reilly and Robert H. Evans.

(2) The stock of said corporation shall be subscribed for and issued as follows: 75% to first party and 25% to second party. It shall be issued for the consideration specified in this agreement.

(3) In addition to its capital, it is contemplated the corporation shall immediately borrow a sum approximating \$200,000.00 for which the capital stock of the corporation shall be pledged if necessary as security by the stockholders, the note or agreement securing said loan to be guaranteed by first party. It is contemplated that this loan shall be a five-year loan, the company to be privileged by the terms thereof to repay the same at an earlier date, and that the loan agreement securing the same will obligate the company to devote all of its net earnings, during the time the loan is outstanding, towards its repayment with interest.

(4) First party will pay its subscription in cash; second party by the furnishing of various paper-

making machinery owned by him known as the Elkhart Machine now located at Watertown, New York, and in Tacoma, Washington, the same having been inspected by an agent of first party and found satisfactory for the purposes for which the parties intend to use the same. It is agreed the machinery has a value of \$48,000.00 and second party will be credited with said amount, the machinery mentioned to be transferred to the Bellingham Paper Products Company by a good and sufficient bill of sale, free of taxes and other items or claims. Delivery of the machinery "as is" shall be made at Watertown and Tacoma upon the signing of this agreement. The balance of capital to be contributed by second party, namely, \$2,000.00 shall be in cash.

(5) First party owns a suitable site in Bellingham, Washington, for the erection of a paper board mill, and agrees to lease the northerly half of Block 189 of New Whatcom Tidelands in said City for use as such site, the lease to run for a term of thirty-five (35) years from date with an annual rental that will yield first party 5% of the actual allocated cost of said site plus 5% of the actual allocated cost of filling the same, which first party hereby undertakes to do as soon as this work can be accomplished.

(6) The site described in paragraph (5) hereof shall be improved as quickly as possible by the erection of a suitable building or buildings for the housing of the machinery and equipment to be obtained from second party, and such other and further machinery and equipment as the company may cause

to be acquired and placed therein. All such machinery shall be overhauled and placed in first-class working condition.

(7) The lease shall contain an option which will vest in the Bellingham Paper Products Company a right to buy the site at any time at a figure which will represent the investment of first party therein, and in addition, a right to renew the lease for a term of twenty-five (25) years after the expiration of the first term of said lease.

(8) Bellingham Paper Products Company, when organized, shall enter into a five-year agency agreement with second party (the agency to run from the beginning of manufacture in said mill) for the sale by second party of the manufactured products of said corporation, the corporation to pay second party 3% of the net sales price f.o.b. the mill at Bellingham on all sales made by the company, and such items of expense as shall be approved by the Board of Directors of the corporation. The sales policy of the company and each contract for sale of the products thereof shall be subject to the approval of the Board of Directors of the company or such designated officer or committee thereof as may be specified by the Board, and second party as sales agent shall have no authority to make binding sales unless the same are approved as herein provided.

Should second party become incapacitated by sickness, injury or other casualty, rendering it impracticable for him to carry on and perform the functions of selling the products of the company, the contract shall vest in the Board of Directors of

the company the power to cancel the same or to suspend it during any such period. Should second party breach the contract of sales in any manner, or should his work in conducting the sales for the company prove inefficient and unsatisfactory to the Board of Directors, the contract shall provide that at any time after two (2) years from the date the mill commences production the Board of Directors may terminate the agreement by paying second party all commissions then due and payable to him and by tendering him in exchange for a transfer of any stock then owned by him the amount invested by him therein at the rate of \$100.00 per share, plus any amount earned by the stock then owned by him not theretofore paid to him in the form of dividends, it being the intention that if any amount has been paid out of net earnings on account of the indebtedness of the corporation or otherwise, that such sum so earned on his stock at the time of cancellation shall be paid to him; provided, it shall be optional with second party whether or not he accepts said tender and transfers his said stock, or whether he will retain the ownership of his stock in the company, provided further, his refusal of such tender shall not affect the cancellation of the sales agency contract, and that nothing herein contained shall be construed as authorizing the second party to voluntarily terminate the agency agreement and claim the benefits of this paragraph. In addition to the commission provided for hereinabove, the new corporation, the Bellingham Paper Products Company, shall pay second party \$100.00

per week to cover one half of the time of second party during the time the board mill is under construction. This payment per week shall terminate when production is started in said plant.

(9) First party agrees to enter into a contract with the Bellingham Paper Products Company to furnish the plant of said corporation steam, water and electricity at the cost to first party, such cost to include amortization of any new construction called for by the contract with said Bellingham Paper Products Company; also to enter into a contract with the Bellingham Paper Products Company to furnish slush pulp at the average monthly net price f.o.b. mill Bellingham, Washington, for finished pulp (all sales considered) less the cost of drying, baling, handling, and commissions of the sale of finished pulp, but plus the cost of metering, pumping and handling the slush pulp. Prices shall be adjusted monthly, based on the current month.

(10) First party and second party, as prospective stockholders in said Bellingham Paper Products Company, agree that they will, upon the organization of said corporation, enter into an agreement effective for ten (10) years after the organization of said corporation, binding each of said parties not to sell their stock nor any shares thereof without first offering it for sale to the opposite party for a period of thirty (30) days at the best price obtainable or offered for said stock. The restriction upon the sale of said stock shall constitute a covenant running with the title to such stock and to the transfer thereof, and no transfer of any shares of

said stock made in violation of said agreement shall be entered of record on the stock ledger of said corporation. A suitable legend indicating the substance of this agreement shall be stamped on each certificate of said stock before same is issued to the parties.

(11) It is agreed that when the corporation, Bellingham Paper Products Company, shall have been organized in accordance with the terms hereof, and the lease described in paragraphs (5), (6) and (7), and the agreements provided for in paragraphs (8), (9) and (10) hereof, have been executed and delivered, that this agreement has been fully performed by the parties as to said paragraphs and shall only remain in effect thereafter as a statement of the intentions of the parties as to the securing of said loan and the erection of said board mill as outlined herein.

In witness whereof the parties hereto have caused this agreement to be executed in triplicate this 22nd day of May, 1946.

Puget Sound Pulp and Timber Co.

/s/ By L. Turcotte,
Executive Vice President

Attest:

/s/ Harry A. Binzer, Secretary
First Party

/s/ Joe A. O'Reilly,
Second Party

State of Washington,
County of Whatcom—ss.

On this 22nd day of May, 1946, before me personally appeared L. Turcotte and Harry A. Binzer, to me known to be the Executive Vice President and Secretary respectively of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute said instrument and that the seal affixed thereto is the corporation seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

/s/ J. C. McGregor

Notary Public in and for the State of Washington,
residing at Bellingham.

EXHIBIT "B"

Agency Agreement

It is agreed between the Bellingham Paper Products Company, a corporation, first party (hereinafter called the "Company"), and Joe A. O'Reilly (business address: 2611 Pacific Avenue, Tacoma, Washington, hereinafter called second party, as follows:

(1) The Company hereby agrees with second party to employ second party as its agent, said agency to commence with the beginning of the man-

ufacture of materials in the paper board mill to be erected by the Company on property leased from Puget Sound Pulp and Timber Co. in Bellingham, Washington, for the exclusive sale by second party of the manufactured products of the Company, the Company to pay second party a commission of three per cent (3%) of the net sales price f.o.b., said mill of the Company at Bellingham, on all sales made by the Company, and also to reimburse second party for such items of expense as shall be incurred by him, the same to be first duly approved by the Board of Directors of the Company. The sales policy of the Company and each contract of sale of its products shall be subject to the approval of the Board of Directors of the Company, or such designated officer or committee of the Board as may be specified by the Board, and second party as sales agent shall have no authority to make binding sales unless the same are approved as hereinabove provided.

(2) Should second party at any time during the life of this contract become incapacitated by sickness, injury or other casualty, rendering it impracticable for him to carry on and perform the functions of selling the products of the Company, the Board of Directors of the Company shall have power to cancel this contract or to suspend it during any such period. Should second party breach this contract in any manner, or should his work in conducting the sales for the company prove inefficient and unsatisfactory to the Board of Directors of the Company, the Board shall at any time after

two (2) years from the date the mill of the Company commences production have authority to terminate the agreement by paying second party all commissions then due and payable to him and by tendering him in exchange for a transfer of any stock then owned by him in the Company, to the Company or its nominee, the amount invested by him therein at the rate of One Hundred Dollars (\$100) per share, plus any amount earned by the stock then owned by second party not theretofore paid second party in the form of dividends, it being the intention of this agreement that if any amount has been paid out of net earnings of the Company on account of its indebtedness or otherwise, that such sum so earned on second party's stock at the time of the cancellation of this agreement shall be paid to him; provided, it shall be optional with second party whether or not he accepts said tender and transfers his stock or whether he will retain the ownership of his said stock in the Company; provided further, that the refusal of second party of such tender shall not affect the cancellation of this contract, and nothing herein contained shall be construed as authorizing second party to voluntarily terminate this contract and claim the benefits of this paragraph.

Nothing above set forth in this paragraph shall be construed as a limitation upon or as affecting the right of either the Company or second party to terminate and end this contract for willful or intentional breach thereof by the opposite party.

In addition to the commissions provided for in

this agreement, The Company shall pay second party One Hundred Dollars (\$100) per week to cover one half of the time of second party during the time the paper board mill is under construction. This payment per week shall terminate when production is started in said plant.

(3) All sales made by second party shall be in the name of the Company, and all goods or products sold shall be shipped directly by the Company to the purchaser. All moneys becoming due the Company for sales shall be collected exclusively by the Treasurer or other designated officer of the Company, and nothing herein contained shall be construed as authorizing second party to undertake to, or to collect on such sales.

(4) Second party agrees to devote such time and effort to the making of said sales as shall be necessary to accomplish the same, and second party agrees to use due diligence and exercise the best of faith in carrying out and performing this contract. Second party further agrees that while this contract is in force and effect, he will not undertake or promote the sale or sales of like, similar, or competing commodities on behalf of any other company or person. Except those products which are manufactured and sold by him in his plants in Tacoma, Wash. operated under the trade name of the Standard Carton Co.

(5) It is further agreed that this contract embodies all the terms and conditions of the agency agreement created hereby and that there are no oral or other understandings not set forth herein.

In witness whereof, the parties hereto have executed this agreement this.....day of June, 1946.

Bellingham Paper Products Company
By....., President

Attest:....., Secretary

.....,
(Joe A. O'Reilly)

[Endorsed]: Filed Sept. 18, 1953.

[Title of District Court and Cause.]

ANSWER, AFFIRMATIVE DEFENSES
AND COUNTERCLAIM

Come now the defendants, Puget Sound Pulp and Timber Co., a corporation, and Lawson Turcotte, and answering the first cause of action of the complaint of the plaintiff, admit, deny and allege as follows:

I.

Defendants admit paragraphs I to V, inclusive.

II.

Answering paragraph VI, defendants admit that Exhibit B therein referred to sets for the terms of the contract entered into between Bellingham Paper Products Company and plaintiff, but deny that the said contract was ever signed by said parties and, therefore, deny that said contract was in writing.

III.

Answering paragraph VII, defendants admit the same, except defendants deny that the dissolution of Bellingham Paper Products Company was completed on March 13, 1948, and allege that the same was completed in December, 1947, and further deny that in the dissolution of Bellingham Paper Products Company the defendant, Puget Sound Pulp and Timber Co., succeeded to or assumed any duties and obligations of said Bellingham Paper Products Company except its current operating expenses and current debts. Defendants deny that the defendant, Puget Sound Pulp and Timber Co., assumed any duties and obligations due or alleged to be due to plaintiff.

IV.

Answering paragraph VIII, defendants deny that the plaintiff fully performed all of the conditions and obligations of the contracts referred to in plaintiff's complaint as Exhibits A and B from their inception down to and including the 29th day of February, 1952. Defendants admit that said written contract, Exhibit A, and oral contract, Exhibit B, therein referred to, were fully performed from their inception down to and including the 31st day of December, 1948; deny that said contracts as later modified, as hereinafter set forth, were not fully performed by the defendant, Puget Sound Pulp and Timber Co., down to and including February 29, 1952, and allege that all moneys due to plaintiff under said contracts, as modified, were paid for the period commencing January 1, 1949, down to

and through the month of February, 1952. Defendants deny that either of the defendants is indebted to plaintiff in the sum of \$59,572.04, or in any sum whatsoever.

V.

Answering paragraph I of plaintiff's second cause of action, defendants admit, deny and allege the same allegations and parts thereof as above admitted, denied and alleged as to plaintiff's first cause of action.

VI.

Answering paragraph II of plaintiff's second cause of action, defendants admit there was in full force and effect the statute of the State of Washington therein referred to, but deny each and every other allegation therein contained.

VII.

Answering paragraph III of plaintiff's second cause of action, defendants admit that the defendant, Lawson Turcotte, was president and one of the directors of the defendant, Puget Sound Pulp and Timber Co., but deny each and every other allegation therein contained and specifically deny that either of the defendants is indebted to plaintiff in the sum of \$119,144.09, or in any sum whatsoever.

VIII.

Answering paragraph I of plaintiff's third but alternative cause of action, defendants admit, deny and allege the same allegations and parts thereof as above admitted, denied and alleged as to plaintiff's first cause of action.

IX.

Answering paragraph II of plaintiff's third but alternative cause of action, defendants deny each and every part thereof and specifically deny that either of the defendants is indebted to plaintiff in the sum of \$208,716.12, or in any sum whatsoever.

Further Answering Plaintiff's Complaint and as a First Affirmative Defense, defendants allege:

X.

That the defendants have no records or recollections indicating that Exhibit B to plaintiff's complaint was ever executed and therefore allege that the same was an oral contract. That during the month of January, 1949, the plaintiff and the defendant, Puget Sound Pulp and Timber Co., entered into an oral agreement amending said oral contract attached to plaintiff's complaint as Exhibit B, which amendment provided that commencing with the month of January, 1949, plaintiff's commission on the net sales of the Paper Board Division of the defendant, Puget Sound Pulp and Timber Co., would be 11½% of the net sales instead of 3% of the net sales, and further provided that the expenses to be allowed and paid to the plaintiff would be increased.

XI.

That at all times commencing with the month of January, 1949, down to and through the month of February, 1952, the defendant, Puget Sound Pulp and Timber Co., paid plaintiff all commissions due

him in accordance with said agreements at the rate of $11\frac{1}{2}\%$ of the net sales.

Further Answering Plaintiff's Complaint and as a Second Affirmative Defense, defendants allege:

XII.

Defendants re-allege each and every allegation hereinabove set forth in defendants' first affirmative defense.

XIII.

That on January 1, 1949, and continuing until February 29, 1952, the defendant, Puget Sound Pulp and Timber Co., regularly and at monthly intervals, paid plaintiff by check all commissions due him on net sales of the Paper Board Division of the defendant, Puget Sound Pulp and Timber Co., at the rate of $11\frac{1}{2}\%$ of the net sales in accordance with said oral agreements hereinabove referred to and furnished with said checks an accounting of all net sales and the rate at which plaintiff's commissions were determined, which checks and accountings were accepted and received by plaintiff without any protest or exception, and that plaintiff is now barred and estopped from asserting that he is entitled to more than $11\frac{1}{2}\%$ of the net sales for said period.

Further Answering Plaintiff's Complaint and as a Third Affirmative Defense, defendants allege:

XIV.

Defendants re-allege each and every allegation

hereinabove set forth in defendants' first affirmative defense.

XV.

That said written and oral contracts referred to in plaintiff's complaint as Exhibits A and B, respectively, provide in part that should plaintiff breach the contract in any manner or should his work in conducting sales of the Bellingham Paper Products Company or the Paper Board Division of the defendant company prove inefficient and unsatisfactory, at any time after two years from the date the paper board mill commenced production, the services of plaintiff could be terminated by paying to plaintiff all commissions then due and payable to him and by tendering him, in exchange for the transfer of any stock of Bellingham Paper Products Company then owned by him, the amount invested by him therein at the rate of \$100.00 per share plus any amount earned by the stock then owned by him not theretofore paid to him in the form of dividends. That the defendant, Puget Sound Pulp and Paper Co., in November, 1947, purchased all stock owned by plaintiff in said Bellingham Paper Products Company at the rate of \$270.00 per share, which was in excess of the amount provided for in said contract. That the paper board mill in question commenced production in May, 1947.

XVI.

That the services of plaintiff in conducting the sales contemplated by the contracts above referred to were inefficient and unsatisfactory and that by

reason thereof his services were terminated by the defendant, Puget Sound Pulp and Timber Co., as of September 1, 1951, although he was paid a commission on all net sales up to and through the month of February, 1952. That the moneys paid to plaintiff by the defendant, Puget Sound Pulp and Timber Co., covering said period from January 1, 1949, through the month of August, 1951, while plaintiff was manager of the Paper Board Division of the defendant, Puget Sound Pulp and Timber Co., and covering the time from September 1, 1951, through the month of February, 1952, when plaintiff performed no services whatsoever for said defendant, Puget Sound Pulp and Timber Co., were tendered to plaintiff as payment in full of all moneys due him and were accepted by plaintiff as such, and constitute an accord and satisfaction.

Further Answering Plaintiff's Complaint and by Way of a Fourth Affirmative Defense, defendants allege:

XVII.

Defendants re-allege each and every allegation hereinabove set forth in defendants' first affirmative defense.

XVIII.

That said contracts provide in part that plaintiff exercise the best of faith in carrying out and performing said contracts, and that while said contracts were in force and effect the plaintiff would not undertake or promote the sale or sales of like,

similar or competing commodities or products of other companies except those products which were manufactured and sold by him in his plant in Tacoma, Washington, operating under the trade name of "Standard Carton Company." That plaintiff breached said contracts in that he did undertake to promote the sale or sales of like, similar or competing commodities or products of companies other than said Standard Carton Company during the year 1951, and that by reason thereof his services were terminated on August 31, 1951, by the defendant, Puget Sound Pulp and Timber Co., in the manner provided in said contracts.

Further Answering Plaintiff's Complaint and by Way of a Fifth Affirmative Defense, defendants allege:

XIX.

Defendants re-allege each and every allegation hereinabove set forth in defendants' first affirmative defense.

XX.

That on or about August 31, 1951, for a valuable consideration passing from the defendants to the plaintiff, the plaintiff and the defendants at said time agreed that the contracts then existing between the parties, including those set forth in plaintiff's complaint, and each of them, as amended, should be terminated and ended on said date and each party released from any further liability and responsibility thereunder. That thereafter the defendant Puget Sound Pulp and Timber Co. paid

the consideration agreed upon and thereupon said mutual release became effective and binding upon the plaintiff and the defendants.

Further Answering Plaintiff's Complaint and by Way of a Sixth Affirmative Defense, defendants allege:

XXI.

Defendants re-allege each and every allegation hereinabove set forth in defendants' first affirmative defense.

XXII.

That said contract of May 22, 1946, was fully carried out by the defendant, Puget Sound Pulp and Timber Co., and that any action thereon is barred by the statute of limitations.

Further Answering Plaintiff's Complaint and by Way of a Seventh Affirmative Defense, defendants allege:

XXIII.

Defendants re-allege each and every allegation hereinabove set forth in defendants' first affirmative defense.

XXIV.

That said oral contract referred to in plaintiff's complaint as Exhibit B and the oral agreement which was entered into by and between plaintiff and defendant, Puget Sound Pulp and Timber Co., in January, 1949, modifying the same, were fully carried out and performed by the defendant, Puget Sound Pulp and Timber Co., and that any action thereon is barred by the statute of limitations.

Counterclaim

Further answering said complaint and as a counterclaim thereto, in accordance with Rule 13 of Title 28 of U.S.C.A., the defendants allege:

XXV.

That certain items of expense which the plaintiff requested the defendant, Puget Sound Pulp and Timber Co. to pay and which were paid by said defendant to or on behalf of the plaintiff for the period from January 1, 1949, until plaintiff's services were terminated, were for plaintiff's personal expenses and were in no way connected with the business of the defendant Puget Sound Pulp and Timber Co. The defendant Puget Sound Pulp and Timber Co. demands an accounting of the plaintiff's expenses incurred for said defendant for said period and is entitled to recover from the plaintiff a judgment for those items of expense improperly charged by the plaintiff to the defendant Puget Sound Pulp and Timber Co. and paid by said defendant to the plaintiff.

Wherefore, having fully answered plaintiff's complaint defendants pray that plaintiff's complaint be dismissed and that they each recover a judgment against plaintiff herein for their costs and statutory attorneys' fees.

Defendant Puget Sound Pulp and Timber Co. further prays that plaintiff be required to account for his expenses charged to and paid by the defend-

ant Puget Sound Pulp and Timber Co. for the period from January 1, 1949, until plaintiff's services were terminated and that said defendant Puget Sound Pulp and Timber Co. recover a judgment against the plaintiff for those items of expense improperly charged to and paid by said Puget Sound Pulp and Timber Co. to said plaintiff.

/s/ EVANS, McLAREN, LANE,
POWELL & BEEKS,

/s/ ROBERT H. EVANS,

/s/ W. BYRON LANE,

/s/ VAUGHN E. EVANS,

/s/ J. ALLAN EVANS,

Attorneys for Defendants

Acknowledgment of Service attached.

[Endorsed]: Filed December 18, 1953.

[Title of District Court and Cause.]

REPLY

Comes Now the plaintiff and in reply to defendants' affirmative defenses and counterclaim alleges as follows:

Plaintiff denies each and every allegation contained in defendants' affirmative defenses, and each of them, and in defendants' counterclaim.

Wherefore, having fully replied, plaintiff prays that defendants take nothing by their Answer and

Counterclaim and that plaintiff have judgment as prayed for in his complaint.

RUMMENS, GRIFFIN, SHORT &
CRESSMAN and MAX
BERNBAUM,
TRACY E. GRIFFIN,
KENNETH P. SHORT,
PAUL R. CRESSMAN,
MAX BERNBAUM,

/s/ By KENNETH P. SHORT,
Attorneys for Plaintiff

Acknowledgment of Service attached.

[Endorsed]: Filed April 14, 1954.

[Title of District Court and Cause.]

PRE-TRIAL STIPULATION

It Is Hereby Agreed and Stipulated by and between counsel of record in the above entitled cause that the following matters are agreed to with reference to the admission of evidence at the time of trial of this cause:

1. The following letters were transmitted between the addressee and sender as indicated on each letter, and each may be admitted into evidence without any further testimony thereon:

(a) Letter dated April 7, 1952, from plaintiff to defendant corporation (original to be produced by defendants).

(b) Letter dated April 8, 1952, from defendant to plaintiff enclosing check No. 40092 in the sum of \$2,048.22 (original is Exhibit 7 to the discovery deposition of plaintiff).

(c) Letter dated July 12, 1951, from plaintiff to L. C. Turcotte (defendants to produce the original).

(d) Letter dated November 21, 1951, from plaintiff to defendant (original to be produced by the defendants).

(e) Letter dated November 24, 1950, from the plaintiff to the defendant (original to be produced by the defendant).

(f) Letter dated September 21, 1951, from the plaintiff to the defendant (original is Exhibit No. 3 to plaintiff's discovery deposition).

(g) Letter dated October 10, 1951, from defendant to plaintiff (copy is Exhibit No. 4 to plaintiff's discovery deposition).

(h) Letter dated October 3, 1951 from Turcotte to plaintiff (copy is Exhibit No. 5 to plaintiff's discovery deposition).

(i) Letter dated October 15, 1951, from plaintiff to defendants (original is Exhibit No. 6 to plaintiff's discovery deposition).

(j) Letter dated June 5, 1953, from plaintiff to defendant (original is Exhibit No. 9 to plaintiff's discovery deposition).

(k) Letter dated June 26, 1953, from plaintiff to the defendant (original is Exhibit No. 10 to plaintiff's discovery deposition).

(l) Letter dated July 14, 1953, from L. Turcotte

to plaintiff, copy of which is Exhibit No. 11 to plaintiff's discovery deposition.

(m) Group of 17 letters which are Exhibit No. 12 to plaintiff's discovery deposition.

(n) Letter dated June 21, 1946, from L. Turcotte to R. H. Evans (original is Exhibit No. 17 to defendant Turcotte's discovery deposition).

(o) Letter dated May 17, 1946, from L. Turcotte to Evans, McLaren & Lane (original is Exhibit No. 16 to defendant Turcotte's deposition).

2. The summary of the moneys paid by Bellingham Paper Products Company and Puget Sound Pulp & Timber Co. to the plaintiff O'Reilly, as shown by the books and records of those companies, may be admitted in evidence without further testimony, except that the plaintiff by so stipulating do not admit that no further moneys are due to the plaintiff O'Reilly.

3. All cancelled checks representing payments to the plaintiff by the defendant and its predecessor corporation may be admitted in evidence without further proof.

4. The record of monthly sales and commissions paid for the period from May 1947 to February 1952, now in the possession of the plaintiff, may be admitted in evidence without further testimony, if the same becomes material.

5. Exhibit "A" attached to the plaintiff's complaint may be admitted in evidence without further testimony.

6. The bill of sale from the plaintiff to the de-

fendant, dated August 17, 1946, may be admitted in evidence without further testimony.

7. Stock option agreement between the defendant corporation and the plaintiff, dated August 19, 1946, may be admitted in evidence without further testimony.

8. Stock pledge agreement, dated 20 May 1947, may be admitted in evidence without further testimony.

9. Extract of the minutes of meetings of Board of Directors of Puget Sound Pulp & Timber Co., which are Exhibit No. 14 to the deposition of the defendant Turcotte and attached to that deposition, may be admitted in evidence without further testimony.

10. A photostatic copy of the minutes of a meeting of the Bellingham Paper Products Company as the same appear in the minute book of that company will be produced by the defendants and may be admitted in evidence without further testimony.

11. Agreement dated December 1, 1947, by Mr. Turcotte and Mr. R. H. Evans in the matter of the liquidation of the Bellingham Paper Products Company will be produced by the defendants and may be admitted in evidence without further testimony.

12. A file containing correspondence furnished by the witness G. H. Nelson of the Salinas Valley Wax Paper Company, which said file is now in the possession of the plaintiff, is a supplement to the deposition of the said G. H. Nelson and will be produced by the plaintiff if the same becomes ma-

terial and may be admitted in evidence without further testimony.

13. Paragraph IV of the plaintiff's second cause of action shall be deemed to have been denied by the defendant's pleadings.

14. Copy of letter dated May 6, 1946, from plaintiff to R. H. Evans may be admitted without further testimony if the same becomes material.

Dated this 19th day of July, 1955.

RUMMENS, GRIFFIN, SHORT &
CRESSMAN,

/s/ By KENNETH P. SHORT,

Counsel for Plaintiff

EVANS, McLAREN, LANE,
POWELL & BEEKS,

/s/ By VAUGHN E. EVANS,

Counsel for Defendants

[Endorsed]: Filed July 21, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be it remembered, this matter came on duly and regularly for trial and was tried before the undersigned Judge of the above entitled court sitting without a jury in the City of Bellingham on July 21 and July 22, 1955, the plaintiff appearing in person and by counsel and the defendant Lawson Turcotte appearing in person and said defendant and

the defendant Puget Sound Pulp & Timber Co., a corporation, appearing by their counsel and the court having heard and considered the evidence of each party, both oral and documentary and having on July 25, 1955 heard the arguments of respective counsel and having on said date rendered its oral opinion, now therefore, the premises considered, this court does make the following

Findings of Fact

I.

That plaintiff is a citizen and resident of the State of California.

II.

That defendant, Puget Sound Pulp & Timber Co., is a private corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal office and place of business in Bellingham, Washington, within the jurisdiction of this court; that the defendant, Lawson Turcotte is a citizen and resident of the State of Washington residing in Bellingham, Washington within the jurisdiction of this court.

III.

That the matter in controversy herein exceeds, exclusive of interest and costs, the sum of three thousand dollars.

IV.

That on the 22nd day of May, 1946, plaintiff and defendant, Puget Sound Pulp & Timber Co., a corporation, entered into a contract in writing admitted

in evidence as Plaintiff's Exhibit No. 1, a true copy of which is attached to these Findings of Fact and Conclusions of Law and marked Exhibit "A" and made a part hereof; (that a copy of said Exhibit is also attached to the complaint and marked as Exhibit "A" thereto).

V.

That on or about the 25th day of May, 1946, the corporation to be organized pursuant said contract, to-wit: Bellingham Paper Products Company, was in fact organized as a Washington corporation immediately upon the execution of said Exhibit "A" and its stock issued as contemplated by said agreement.

VI.

That pursuant to said Exhibit "A", Bellingham Paper Products Co., a corporation, and plaintiff, in the latter part of June, 1946, entered into a contract which, although reduced to writing, was not in fact signed by the parties thereto; that said unsigned contract is admitted in evidence as plaintiff's Exhibit No. 3 and is attached to these Findings of Fact and Conclusions of Law as Exhibit "B" and by this reference made a part hereof; (that a copy of said Exhibit is also attached to the complaint and marked as Exhibit "B" thereto); that said Exhibit states all of the terms and conditions of the agreement between plaintiff and said Bellingham Paper Products Company; that said contract was formally ratified, approved and adopted by the Board of Directors of said Bellingham Paper Products Co. on June 27, 1946.

VII.

That the stock of said Bellingham Paper Products Co. was issued 75% to defendant Puget Sound Pulp & Timber Co. and 25% to plaintiff; that in November, 1947 the defendant Puget Sound Pulp & Timber Co. purchased from plaintiff all of his stock in said Bellingham Paper Products Co. and became the sole stockholder thereof; that thereafter and on or about December 15, 1947 the defendant corporation, as sole stockholder, dissolved Bellingham Paper Products Co. and in the dissolution thereof acquired all of the rights and assets of said dissolved corporation and assumed all of the liabilities, duties and obligations of said Bellingham Paper Products Co., including the rights, duties and obligations specified in said Exhibit "B" attached hereto; that the defendant Puget Sound Pulp and Timber Co. assumed the obligations to plaintiff under said Exhibit "B" by written, signed agreement dated December 1, 1947 between Lawson Turcotte and Robert H. Evans as liquidating trustees of Bellingham Paper Products Co. on the one hand and the defendant Puget Sound & Timber Co., on the other, which written agreement is in evidence as plaintiff's Exhibit No. 10.

VIII.

That upon the dissolution of Bellingham Paper Products Co. and the acquisition of its assets and liabilities by the defendant Puget Sound Pulp & Timber Co., the operation and functions of said dissolved corporation were integrated into the oper-

ation of the defendant Puget Sound Pulp & Timber Co. and became thereafter known as the Paperboard Division of said Puget Sound Pulp & Timber Co.

IX.

That plaintiff fully performed all of the conditions and obligations by him to be performed under said contracts, Exhibits "A" and "B" attached from the inception thereof down to and including the 29th day of February, 1952 upon which latter date said contracts were mutually terminated by plaintiff and defendant Puget Sound Pulp & Timber Co.; that from the commencement of production by Bellingham Paper Products Co. in May, 1947 until its dissolution on December 15, 1947, Bellingham Paper Products Co. paid unto plaintiff in accordance with Exhibit "B", 3% of the net sales of said corporation; that from December 15, 1947 until and including December 31, 1948, defendant Puget Sound Pulp & Timber Co. paid unto plaintiff 3% of the net sales of the Paperboard Division of defendant Puget Sound Pulp & Timber Co. pursuant to said contracts, Exhibit "A" & "B".

X.

That in December, 1948 or January, 1949, plaintiff, without consideration or promise of consideration, advised defendant Puget Sound Pulp & Timber Co. that he would temporarily reduce his commission to 1½% of net sales of the Paperboard Division of defendant corporation and would in effect, postpone collection of the remainder thereof.

That commencing with January 1, 1949 defendant Puget Sound Pulp & Timber Co. commenced paying to plaintiff and plaintiff received from said defendant, monthly commission payments at the **rate of 11½%** of the net sales of the Paperboard Division of defendant corporation. That said practice continued monthly down to and including February 29, 1952. That said reduction in plaintiff's commission from 3% to 11½% of the net sales of said Division was without consideration or promise of consideration. That between the inclusive dates of January 1, 1949 to and including February 29, 1952 defendant Puget Sound Pulp & Timber Co. paid unto plaintiff the gross sum (before income tax withholding and old age benefit deductions) of \$59,572.04, which sum is equivalent to 11½% of net sales of said Paperboard Division during said period instead of the 3% of net sales provided for in Exhibits "A" & "B" attached hereto. That a detailed breakdown of said payments is attached hereto as Exhibit "C" and by this reference made a part hereof.

XI.

That in the fall of 1950 plaintiff notified defendant Puget Sound Pulp & Timber Co. that he was contemplating the installation of a paperboard mill in Richmond, California. In July, 1951 the management of the defendant corporation deemed such proposed venture by plaintiff to be incompatible with his future employment with defendant corporation; that in the latter part of July, 1951, plaintiff (contending that his services should terminate

effective December 31, 1952) and defendant corporation through defendant, Turcotte (contending plaintiff's services should terminate September 1, 1951) orally stipulated and agreed that the services of plaintiff should terminate as of February 29, 1952. The court finds that such agreement of July, 1951 was not, nor was it intended by the parties to be, an accord and satisfaction of any of defendant corporation's indebtedness to plaintiff under said contracts, Exhibits "A" and "B". Further, the Court finds that no consideration was promised to plaintiff or received by plaintiff to support any alleged accord and satisfaction or mutual release either at this time or at any previous or later time, from the inception of of said contracts to and including February 29, 1952. The Court finds that plaintiff performed all of the conditions and obligations by him to be performed under Exhibits "A" & "B" from the inception thereof down to and including February 29, 1952; that during said inclusive dates, Puget Sound Pulp & Timber Co. did not offer to do, nor do anything which said corporation was not theretofore obligated to do under Exhibits "A" & "B".

XII.

That said proposed Paperboard mill installed by plaintiff in Richmond, California at the time of the conversations referred to in the preceding paragraph XI, had not commenced production of any products; that the first production issuing from said mill was in October or November, of 1951.

XIII.

The Court finds that there was no meeting of the minds of plaintiff and defendant corporation nor any intent on the part of either of said parties to rescind, modify, release or discharge each other by virtue of an accord and satisfaction or otherwise of or from the obligations of the contracts, Exhibits "A" & "B" attached hereto.

XIV.

The Court finds that the defendants have failed to sustain the burden of proof of its affirmative defenses of modification of Exhibits "A" & "B", of estoppel, of accord and satisfaction, of breach by plaintiff of said contracts, of mutual release, of the statute of limitations, and of the statute of frauds; that the counter-claim of the defendants was abandoned and no evidence adduced in support thereof.

To all of the foregoing defendants except and their exceptions are allowed.

Done in open Court this 15th day of August, 1955.

/s/ JOHN C. BOWEN,
Judge

Wherefore, from the foregoing Findings of Fact, this court does deduce the following

Conclusions of Law

I.

That this court is possessed of jurisdiction of the parties and to the subject matter of this action.

II.

That no consideration was promised or tendered by defendant, Puget Sound Pulp & Timber Co. nor received by plaintiff for the reduction of plaintiff's commission from 3% to 11½% of net sales of the Paperboard Division of defendant corporation, nor were there any valid agreements of any kind or nature entered into between plaintiff and defendant, Puget Sound Pulp & Timber Co., a corporation, which in any way vitiated or modified, or in any way changed or altered the duties and obligations of said defendant, Puget Sound Pulp & Timber Co., to the plaintiff herein.

III.

That there was no consideration for any alleged accord and satisfaction or release of defendant corporation's obligations to plaintiff under Exhibits "A" and "B".

IV.

That the defendants have failed to sustain the burden of proof of their affirmative defenses and each of them and of their counter-claim; that said counter-claim should be dismissed.

That the defendant Lawson Turcotte should be dismissed as a party defendant without costs; that plaintiff's second cause of action and plaintiff's third alternative cause of action, and each of them, should be dismissed.

VI.

That under his first cause of action, plaintiff is entitled to judgment from and against the defend-

ant Puget Sound Pulp & Timber Co. in the sum of \$59,572.04, ~~together with interest at 6% per annum until paid on each unpaid monthly amount which became due him as the same accrued in accordance with Exhibit "C" attached hereto, commencing with the 1st day of February, 1949 and on each installment thereafter up to and including the installment due plaintiff for the month of February, 1952, [J.C.B.] together with plaintiff's costs and disbursements taxable herein.~~

To all of the foregoing defendants except and their exceptions are allowed, and plaintiff excepts to the Court's disallowance of interest in the words stricken out above, and his exception is allowed.

Done in open court this 15th day of August, 1955.

/s/ JOHN C. BOWEN,
Judge

Rummens, Griffin, Short & Cressman &
Max Bernbaum

/s/ By Kenneth P. Short,
Attorneys for Plaintiff

[Printer's Note: Exhibit A and B attached hereto are duplicates of Exhibit A and B attached to Complaint set out at Pages 9 to 19.]

EXHIBIT "C"

Payments received by plaintiff from defendant Puget Sound Pulp & Timber Co., covering the period January, 1949 to February 29, 1952:

	Month	Net Commission
1949	Jan.	\$1,054.63
	Feb.	807.57
	Mar.	1,105.98
	Apr.	1,158.45
	May	1,245.07
	June	1,345.92
	July	1,118.30
	Aug.	1,556.08
	Sept.	1,277.52
	Oct.	1,408.47
	Nov.	1,154.36
	Dec.	1,088.68
1950	Jan.	1,181.23
	Feb.	1,454.57
	Mar.	1,372.01
	Apr.	1,392.48
	May	1,312.38
	June	1,603.57
	July	1,498.32
	Aug.	1,899.77
	Sept.	1,621.73
	Oct.	1,743.93
	Nov.	1,537.47
	Dec.	1,721.74
1951	Jan.	2,166.00
	Feb.	1,751.36
	Mar.	1,790.78
	Apr.	1,688.54
	May	1,990.07
	June	1,914.12
	July	2,185.90

son and by counsel and the defendant Lawson Turcotte appearing in person and said defendant and the defendant Puget Sound Pulp & Timber Co., a corporation, appearing by their counsel and the court having heard and considered the evidence of each party, both oral and documentary and having on July 25, 1955 heard the arguments of respective counsel and having on said date rendered its oral opinion, and having heretofore rendered, made and entered Findings of Fact and Conclusions of Law in conformity therewith, it is by the Court,

Ordered, Adjudged and Decreed that the above entitled cause as to the defendant Lawson Turcotte be and the same is hereby dismissed with prejudice and without costs to either party, and it is further,

Ordered, Adjudged and Decreed that the counterclaim of the defendants be and the same is hereby dismissed with prejudice; and it is further,

Ordered, Adjudged and Decreed that plaintiff have and recover from defendant Puget Sound Pulp & Timber Co., a corporation, the sum of \$59,572.04, ~~together with interest at 6% per annum on each unpaid monthly amount which became due plaintiff in accordance with Exhibit "C" attached to the Findings of Fact and Conclusions of Law, interest on the first of such monthly sums accruing from February 1, 1949 and on the last thereof from March 1, 1952 until paid, [J. C. B.] and for his costs and disbursements herein now taxed herein in the~~ further sum of \$77.30, together with interest on said sums at the rate of 6% per annum from this date until paid, to all of which defendants except

and their exceptions are allowed, and plaintiff excepts to the Court's disallowance of interest in the foregoing words stricken out by the Court and his exception is allowed.

Done in open Court, this 15th day of August, 1955.

/s/ JOHN C. BOWEN,
Judge

Rummens, Griffin, Short & Cressman &
Max Bernbaum, Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Lodged Aug. 8, 1955. Filed Aug. 15, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Puget Sound Pulp and Timber Co., a corporation, and Lawson Turcotte, defendants herein, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the above entitled action on or about August 15, 1955.

Dated at Seattle, Washington, this 29th day of August, 1955.

/s/ EVANS, McLAREN, LANE,
POWELL & BEEKS,
Attorneys for Defendants

Acknowledgment of Service attached.

[Endorsed]: Filed September 7, 1955.

[Title of District Court and Cause.]

NOTICE OF CROSS APPEAL

Notice Is Hereby Given:

That Joe A. O'Reilly, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain judgment made and entered by the above entitled court in the above entitled action on the 15th day of August, 1955, insofar as said judgment fails to allow and award to plaintiff interest upon the principal sum therein awarded.

Dated this 6th day of September, 1955.

GEO. R. RUMMENS,
TRACY E. GRIFFIN,
KENNETH P. SHORT,
PAUL R. CRESSMAN,
RICHARD M. OSWALD,
MAX BERNBAUM,

/s/ By KENNETH P. SHORT,
Attorneys for Plaintiff-Cross
Appellant Joe A. O'Reilly

Acknowledgment of Service attached.

[Endorsed]: Filed September 7, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON CROSS-APPEAL

Know All Men By These Presents:

That we, Joe A. O'Reilly the Plaintiff above named, as Principal, and the United Pacific Insurance Company, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto Puget Sound Pulp & Timber Co., a corporation, and Lawson Turcotte in the just and full sum of Two Hundred Fifty and No/100 Dollars (\$250.00) for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of August, 1955.

The Condition of This Obligation Is Such, That, whereas, the District Court of the United States for the Western District of Washington, Northern Division on the 15th day of August, 1955, in the above entitled action and Court, entered its judgment whereby said plaintiff have and recover from defendants Puget Sound Pulp & Timber Co., a corporation, the sum of \$59,572.04 together with costs and disbursements of \$77.30 but disallowing the interest claim.

And Whereas, The above named Principal has heretofore given due and proper notice that he cross-appeals from the amount of said judgment to

[Title of District Court and Cause.]

ORDER

Upon the foregoing stipulation, it is hereby

Ordered that the court's order approving the defendants' supersedeas bond heretofore entered, is vacated, and it is further

Ordered that said bond is canceled and held for naught and may be withdrawn by the defendants from the records and files of the clerk of this court.

Done in Open Court this 13th day of September, 1955.

/s/ JOHN C. BOWEN,
United States District Judge

Approved and Presented by:

/s/ RAYMOND W. HAMAN,
Of Attorneys for Defendants

Approved, Consent to Entry, and Notice of Presentation Waived:

/s/ KENNETH P. SHORT,
Of Attorneys for Plaintiff

Received the supersedeas bond in the foregoing action this 19th day of September, 1955.

/s/ J. ALLAN EVANS

[Endorsed]: Filed September 13, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally, acknowledge that we and our personal representatives are bound to pay to Joe A. O'Reilly the sum of Two Hundred Fifty Dollars (\$250.00).

The condition of this bond is that,

Whereas, the defendants have appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed September 6, 1955, from the judgment of this court entered August 15, 1955, if the defendants shall pay all costs adjudged against them if the Appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this bond is to be void, but if the defendants fail to perform this condition, payment of the amount of this bond shall be due forthwith.

Sealed with our seals this 12th day of September, 1955.

PUGET SOUND PULP & TIMBER
CO.,

LAWSON TURCOTTE,

By EVANS, McLAREN, LANE,

POWELL & BEEKS,

/s/ By W. BYRON LANE, Their Attorneys
HARTFORD ACCIDENT AND IN-
DEMNITY COMPANY,

/s/ By JACK GRIFFIN,

Attorney-in-Fact

[Seal]

[Endorsed]: Filed September 13, 1955.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD
AND STATEMENT OF POINTS

Designation of Record to be Transmitted
on Appeal

Comes Now the defendant, Puget Sound Pulp & Timber Company, and, pursuant to Rule 75 (a) of the Federal Rules of Civil Procedure, designates the entire record as necessary and material to be considered upon this appeal.

Statement of Points Upon Which Appellant
Relies

Comes Now the defendant, Puget Sound Pulp & Timber Company, and states the following points upon which it relies upon this appeal:

1. The District Court erred in holding that the contract of May 22, 1946 (Plaintiff's Exhibit No. 1) was a five-year employment contract.

2. The District Court erred in holding that the unsigned contract between plaintiff and defendant's predecessor (Plaintiff's Exhibit No. 3) constituted an enforceable contract for employment for five years under the Statute of Frauds of the State of Washington.

3. The District Court erred in holding that the plaintiff had an enforceable written employment contract for five years commencing in May of 1947, which defendant could not terminate.

4. The District Court erred in holding that a contract cannot be modified by mutual consent of all parties.

5. The District Court erred in holding that a new or independent consideration is necessary to effect a modification of an executory contract.

6. The District Court erred in failing to hold that the plaintiff's conduct estopped him from asserting a claim for additional compensation.

7. The District Court erred in holding plaintiff's secret and unexpressed intention as to the meaning of his contract with the defendant, as binding upon the defendant.

8. The District Court erred in holding that the agreement to accept, and the acceptance by the plaintiff, of compensation for six months after he left the defendant's employment, were not an accord and satisfaction of all claims for compensation due the plaintiff.

9. The District Court erred in failing to hold the agreement of July 1951 as a binding mutual release of the plaintiff's and defendant's obligations to one another.

10. The District Court erred in failing to hold the plaintiff's claim, as based upon Plaintiff's Exhibit No. 1, barred by the six-year Statute of Limitations of the State of Washington.

11. The District Court erred in failing to find the plaintiff had not breached his employment contract by organizing and operating a competitive company.

12. The District Court's finding that in January 1949, the plaintiff temporarily reduced his compensation by one-half and, in effect, postponed the collection of the remainder thereof, is clearly erroneous, and is not supported by an iota of evidence.

PUGET SOUND PULP & TIMBER
CO., Defendant

/s/ By VAUGHN E. EVANS,
Of Attorneys for Defendant

Acknowledgment of Service attached.

[Endorsed]: Filed October 7, 1955.

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF RECORD
AND STATEMENT OF POINTS

Comes Now plaintiff, Joe A. O'Reilly, and, pursuant to rule 75(a) of the Federal Rules of Civil Procedure, designates the entire record as necessary and material to be considered upon the appeal and cross-appeal.

Statement of Points Upon Which Appellee-
Cross Appellant Relies

Comes Now plaintiff, Joe A. O'Reilly, and states the following point upon which he relies upon cross-appeal:

1. The District Court erred in disallowing interest upon the judgment and in eliminating the

provision therefor in plaintiff's proposed form of findings of fact, conclusions of law, and judgment.

JOE A. O'REILLY, Plaintiff
/s/ By KENNETH P. SHORT,
Of Attorneys for Plaintiff

Acknowledgment of Service attached.

[Endorsed]: Filed October 7, 1955.

[Title of District Court and Cause.]

STIPULATED FACTS IN NARRATIVE FORM
FOR CONSIDERATION ON APPEAL

It Is Hereby Agreed and Stipulated by and between counsel of record for both parties that the following facts may be considered by the Court on appeal as admitted and true:

1. Defendant, Puget Sound Pulp & Timber Company, a corporation, is, and at all times material to this lawsuit was, in the business of manufacturing pulp for paper manufacturers and certain other uses.

2. The plaintiff, Joe O'Reilly, is an individual.

3. All Exhibits offered by both litigants were admitted in evidence and may be considered by the Court upon this appeal.

4. The Bellingham Paper Products Company became a corporation licensed to do business in the State of Washington in the month of June, 1946.

5. The plaintiff was one of the incorporators of the Bellingham Paper Products Company and ac-

quired twenty-five percent of the common stock in exchange for a machine for making paper board, valued at \$48,000.00, and \$2,000.00 in cash. The defendant, Puget Sound Pulp & Timber Company, acquired seventy-five percent of the initial common stock for the cash sum of \$150,000.00.

6. The Bellingham Paper Products Company employed the plaintiff as its sales agent in accordance with the terms of plaintiff's Exhibit 3, but said document was never signed by any of the parties. The parties, however, do not dispute that the terms set forth in plaintiff's Exhibit 3 are the terms of the plaintiff's employment contract.

7. The Bellingham Paper Products Company began producing paper board in May of 1947. The plaintiff was paid three percent of the net sales as compensation for his services, beginning with the month of May, 1947, and continued at such rate until January, 1949, at which time he began receiving compensation at the rate of one and one-half percent of the net sales until February 29, 1952. The true conditions under which the plaintiff began receiving the lesser rate of compensation is in dispute and will be covered by the transcript of testimony in question-and-answer form.

8. The Bellingham Paper Products Company was dissolved on December 15, 1947. Defendant Puget Sound Pulp & Timber Company paid the plaintiff \$135,000.00 in cash for his one-fourth interest in the Bellingham Paper Products Company and the defendant Puget Sound Pulp & Timber Company then took over the former operation of

the Bellingham Paper Products Company as a division of the defendant company. The plant was thereafter operated by the Puget Sound Pulp & Timber Company throughout the remaining period material to this lawsuit.

9. In July of 1951, an arrangement was reached between the plaintiff and the defendant as to the termination of the plaintiff's employment for the defendant. The circumstances surrounding this arrangement and what agreements, if any, were entered into, are in dispute and the record thereon will be covered in question-and-answer form.

Dated this 3rd day of October, 1955.

/s/ KENNETH P. SHORT,

Of Attorneys for Plaintiff

/s/ VAUGHN E. EVANS,

Of Attorneys for Defendant

[Endorsed]: Filed October 7, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of

Civil Procedure, I am transmitting herewith all of the original documents and papers in the file dealing with the above cause as the record on appeal herein from the Judgment filed August 15, 1955 to the United States Court of Appeals for the Ninth Circuit, at San Francisco, said papers being identified as follows:

1. Complaint, filed September 18, 1953.
2. Marshal's Return on Summons, filed October 10, 1953.
3. Appearance of Defendant Puget Sound Pulp and Timber Company, filed October 24 1953.
4. Motion to Dismiss Plaintiff's Complaint, filed October 24, 1953.
5. Appearance of Defendant Lawson Turcotte, filed October 24, 1953.
6. Motion to Dismiss Plaintiff's Complaint, filed October 24, 1953.
7. Bond for Costs, Non-Resident Plaintiff, filed November 12, 1953.
8. Notice of filing Cost Bond for Non-Resident Plaintiff, filed November 13, 1953.
9. Notice of Motion, filed December 18, 1953.
10. Motion for production of documents under Rule 34, filed December 18, 1953.
11. Affidavit in support of Motion, filed December 18, 1953.
12. Answer, Affirmative Defenses and Counterclaim, filed December 18, 1953.
13. Stipulation re continuance of hearing on Motion for production of documents and Order, filed January 5, 1954.

14. Motion to Strike, filed February 18, 1954.
15. Plaintiff's Motion for more definite statement, filed February 18, 1954.
16. Motion to Dismiss Counterclaim, filed February 18, 1954.
17. Motion for production of documents, filed February 18, 1954.
18. Affidavit in support of Motion to Produce, filed February 18, 1954.
19. Notice of Motions, filed February 18, 1954.
20. Plaintiff's Memorandum in support of Motion to Dismiss Counter-Claim and to Strike and Motion for more definite statement, filed April 2, 1954.
21. Defendants' Memorandum of Authorities in opposition to Plaintiff's Motion to Strike, filed April 7, 1954.
22. Reply, filed April 14, 1954.
23. Pre-trial discovery deposition of Lawson P. Turcotte taken at request of Plaintiff, and Pre-trial deposition of Joe A. O'Reilly taken at request of defendants, filed October 16, 1954.
24. Notice of filing deposition, filed October 30, 1954.
25. Stipulation, filed November 18, 1954.
26. Notice of taking deposition upon oral examination (Gay Nelson), filed December 11, 1954.
27. Notice of taking deposition upon oral examination (John H. Frankl), filed December 11, 1954.
28. Deposition of John H. Frankl, filed January 22, 1955.

29. Depositions of Thomas Guy Emmons and Gaylord Nelson, filed February 19, 1955.

30. Notice of filing deposition (Lawson P. Turcotte), filed July 12, 1955.

31. Notice of filing deposition (John H. Frankl), filed July 12, 1955.

32. Notice of filing deposition (Thomas G. Emmons), filed July 12, 1955.

33. Notice of filing deposition (Gaylord Nelson), filed July 12, 1955.

34. Praecipe for Subpoena Duces Tecum, filed July 19, 1955.

35. Defendants' Trial Memorandum, filed July 21, 1955.

36. Plaintiff's Trial Memorandum, filed July 21, 1955.

37. Pre-Trial Stipulation, filed July 21, 1955.

38. Marshal's Return on Subpoena Duces Tecum, filed July 28, 1955.

39. Copy of proposed Findings of Fact and Conclusions of Law, lodged August 6, 1955.

40. Court Reporter's copy of Oral Decision, filed August 11, 1955.

41. Findings of Fact and Conclusions of Law, filed August 15, 1955.

42. Judgment, filed August 15, 1955.

43. (Supersedeas Bond withdrawn by Court Order on September 13, 1955.)

44. Notice of Appeal, filed September 7, 1955.

45. Notice of Cross Appeal, filed September 7, 1955.

46. Bond for costs on Cross Appeal, filed September 7, 1955.

47. Stipulation regarding withdrawal and substitution of Supersedeas Bond and Order, filed September 13, 1955.

48. Order, filed September 13, 1955.

49. Bond for Costs on Appeal, filed September 13, 1955.

50. Order re Exhibits, filed October 6, 1955.

51. Designation of Record on Appeal and Statement of Points upon which Appellant relies, filed October 7, 1955.

52. Stipulated facts in narrative form for consideration on Appeal, filed October 7, 1955.

53. Designation of Record and Statement of Points upon which Appellee relies, filed October 7, 1955.

I further certify that the following is a true and correct statement of all expenses, costs, and fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to-wit: Filing fee, Notice of Appeal, \$5.00, and that said amount has been paid to me by counsel for appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Bellingham, this 12th day of October, 1955.

[Seal]

MILLARD P. THOMAS,

Clerk

/s/ By MARJORIE J. EDQUIST,

Deputy Clerk

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 as amended, of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) of the Federal Rules of Civil Procedure, I am transmitting herewith, supplemental to the record on appeal in the above cause, the following additional document:

54. Court Reporter's Transcript of Proceedings at trial, July 21, 22 and 25, 1955, filed September 7, 1955.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Bellingham, this 13th day of October, 1955.

[Seal]

MILLARD P. THOMAS,
Clerk

/s/ By MARJORIE J. EDQUIST,
Deputy Clerk

In the District Court of the United States, Western
District of Washington, Northern Division

No. 125 (In Bellingham)

JOE A. O'REILLY, Plaintiff,

VS.

PUGET SOUND PULP AND TIMBER CO.,
a corporation, and LAWSON TURCOTTE,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable John C. Bowen, District Judge. [1*]

* * * * *

JOE A. O'REILLY

called as a witness by and in his own behalf, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * * * [5]

Q. (By Mr. Short): And what is your present employment or occupation?

A. I am the sales manager for the paperboard of the California Container Corporation, which is a wholly owned subsidiary of the Container Corporation of America. * * * * *

Q. (By Mr. Short): How long have you been the sales manager in the paperboard division of the California Container Corporation? [6]

* Page numbers appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Joe A. O'Reilly.)

A. I would say two and a half years or a little longer.

Q. That mill is located, is it not, in Richmond, California?

A. No. It is in Los Angeles, California. There is also a mill in Tacoma, Washington.

Q. All right. Now, prior to your entering into any contract with the Puget Sound Pulp and Timber Company in 1946, will you tell the Court what your occupation was just prior to that time, that is to say prior to May 22, 1946?

A. Well, I purchased and operated a folding carton business in Tacoma, Washington, under the name of the Standard Carton Company, and in 1944 I constructed a paperboard mill in that city, which was operated under the same name.

Q. How long prior to May 22, 1946, were you in the paper carton business?

A. Oh, approximately three years before 1928, which would be about a total of 20 years prior to 1946.

Q. Approximately 20 years prior to 1946?

A. That is right.

Q. All right. And what was the general nature of the business of Standard Carton Company? What did it produce? [7]

A. Folding paper boxes.

Q. Were you during that period of time a customer in any way of Puget Sound Pulp and Timber Company?

A. Not directly. I believe that at one time I

(Testimony of Joe A. O'Reilly.)

purchased two carloads of pulp for shipment to a paperboard mill in Longview.

Q. But that would not be the normal course of the Standard Carton Company's business?

A. No.

Q. Did you have any conversations with any representative of Puget Sound Pulp and Timber Company prior to the execution of this contract of May 22, 1946?

A. Over a period of approximately a year and a half I talked to Mr. Roberg mostly about the project of building a paperboard mill in Bellingham.

Q. Do I understand then that your original negotiations and discussions with the representatives of the defendant Puget Sound Pulp and Timber Company were not originally in reference to your becoming an employee of that concern, is that correct?

A. No, they were not.

Q. What was the general plan discussed that ultimately evolved into this contract?

A. I owned a paperboard machine in Watertown, New York, which I intended to install in a board mill yet to [8] be erected, and——

Q. (Interposing): In Bellingham?

A. Well, in some place. I approached the Puget Sound Pulp and Timber Company with the idea of buying a piece of ground adjacent to the pulp mill and making a contract to buy slush pulp and steam from them.

Q. And where physically, in reference to the

(Testimony of Joe A. O'Reilly.)

property of Puget Sound Pulp and Timber Company, was it anticipated that you would erect this mill?

A. Well, I suggested that possibly I could buy a portion of their land or occupy the original pulp mill building which was then not being used.

* * * * * [9]

Q. Now, was that plan, that is to say of your occupying a building of the defendant corporation, was that plan abandoned in these discussions?

A. Yes, it was.

Q. And what supplanted that suggestion?

A. A plan was evolved and agreed on to form a new corporation which would build a building on the property of Puget Sound Pulp and Timber Company on a lease basis, [11] install this machinery that I had, and a corporation would be formed of which I would have twenty-five percent.

Mr. Short: I am now offering pursuant to the stipulation Plaintiff's Exhibit 1, being a contract which is attached to the complaint and identified as Exhibit A to the complaint. * * * * * [12]

The Court: Plaintiff's Exhibit 1 is now admitted.

* * * * *

Q. (By Mr. Short): Mr. O'Reilly, pursuant to Plaintiff's Exhibit 1, the agreement between yourself and Puget Sound Pulp and Timber Company dated May 22, 1946, apparently requires your contribution of certain items to the capital of the corporation designated therein as Bellingham Paper

(Testimony of Joe A. O'Reilly.)

Products Company, a corporation to be organized by the parties. Do you recall that?

A. Yes.

Q. Did you contribute those items to the Bellingham Paper Products Company pursuant to that agreement? A. Yes, I did. * * * * * [13]

The Court: Plaintiff's Exhibit 2 is admitted.
* * * * * [14]

Q. (By Mr. Short): The contract, Exhibit 1, between yourself and the defendant corporation of May 22, 1946, further apparently anticipated your contributing some \$2,000.00 in cash?

A. Yes, it did.

Q. Did you make that contribution?

A. Yes, I did. * * * * *

Q. (By Mr. Short): Mr. O'Reilly, you are about to be handed what has been marked for identification as Plaintiff's Exhibit 3. Do you recognize that instrument? A. Yes. [16]

Q. What is it?

A. It is an agency agreement between the Bellingham Paper Products Company and myself.

Mr. Short: May I say to the Court that the witness now has in his hand what is pleaded in the complaint as an attachment, Exhibit B.

* * * * * [17]

Q. (By Mr. Short): Mr. O'Reilly, are there signatures on the signature page of that document?

A. This document is not signed.

Q. Is that the only such document or did you

(Testimony of Joe A. O'Reilly.)

ever have any other copy of that document furnished to you by the defendant or by Bellingham Paper Products Company?

A. There are several copies in existence, but this [18] is the only one that I have.

Q. Was the original of that document signed by you? A. It was my impression that it was.

Q. Can you state whether or not it was signed by any officer of the Bellingham Paper Products Company?

A. I think that it was at the same time.

Q. If you recall, can you state when the signatures were affixed to that document?

A. I can't recall specifically.

Q. Do you recall in addition to yourself who the signer on behalf of Bellingham Paper Products Company was?

A. It would probably be Mr. Roberg as the President.

Q. Was Mr. Roberg the President of Bellingham Paper Products Company?

A. Yes, he was.

Q. What capacity or office, if any, did he hold with Puget Sound Pulp and Timber Company?

A. Vice President.

The Court: Was he mentioned as an original incorporator in the Articles or otherwise in the original papers creating the corporation?

Witness: I think that he was.

Mr. Short: May the record now show, if the Court please, that I have made demand and also

(Testimony of Joe A. O'Reilly.)

issued a subpoena on the defendants for production [19] of this document and have been advised that no original——

The Court: (Interposing) Relating to what paper as an exhibit number?

Mr. Short: Exhibit 3, if the Court please, which the witness now has in his hand.

Q. (By Mr. Short): Now, Mr. O'Reilly——

Mr. Short: The plaintiff offers Plaintiff's Exhibit 3 for identification.

Mr. Evans: I am going to object to it, Your Honor, as not being competent as a copy of a written contract signed by the parties or party to be charged.

So far as it might be a memorandum which sets forth what the parties actually agreed to but never signed, we would have no objection, but if it is offered or purports to be offered as a written signed contract, I object to it.

I further object to it because of the stapled on notation on the last page, the handwritten little note which is attached to it, which has not been identified, and it certainly looks out of place there, There has been no comment on it.

The Court: It seems to me counsel on both sides in the future would anticipate objections to information [20] written on a document to be offered which may not have been a part of it when it was executed.

Mr. Short: In reference to that matter of the memorandum attached, I call attention to the state

(Testimony of Joe A. O'Reilly.)

of the pleadings on that matter; that is to say, there is pleaded and attached to the complaint as Exhibit B this document, including the matters to which counsel just referred as being penciled notations, and the answer of the defendants admits that that Exhibit B is a true and correct copy of the agreement between the parties, and that it is an agreement, in those words, and denies only its execution as a signed document.

Mr. Evans: May it please the Court, the copy of Exhibit B to the complaint as served upon my client contains no such stapled on notation as I see it in my file here.

Mr. Short: Well, it is not stapled, no, in handwriting on Exhibit B. It is typed on Exhibit B that is attached to the complaint.

May I see that exhibit a moment?

(Whereupon Plaintiff's Exhibit 3 for identification is handed to Mr. Short by the bailiff.)

Mr. Short: The handwritten language, if it please the Court, reads—— [21]

The Court: (Interposing) Well, I would not read it. Let it be compared.

Mr. Short: I may say it is the sentence beginning on line 4 and ending on line 6 of page 3 of Exhibit B.

The Court: One way of validating that statement is to have some witness identify it, if there is any such witness available.

Mr. Short: Very well. I will do that. If you will hand it to the witness and—Mr. Evans, will you

(Testimony of Joe A. O'Reilly.)

produce, in accordance with the stipulation, the last document in our stipulation, No. 14, the letter of May 6, 1946—Excuse me. That is not what I want. Item No. (n) on page 2 of the stipulation, letter dated June 21, 1946 from Mr. Turcotte to Mr. Evans. * * * * * [22]

The Court: Plaintiff's Exhibit 4 is now offered. It is admitted. * * * * * [24]

Q. (By Mr. Short): Mr. O'Reilly, do you notice the penciled notation on the Exhibit 3 you have in your hand? A. Yes, I do.

Q. Can you tell the Court in whose handwriting that penciled notation is?

A. It is in my handwriting. * * * * * [25]

Mr. Short: I will reoffer Exhibit 3 for identification.

Mr. Evans: I have no objection to it being admitted if it is limited to the terms of what the parties agreed to. I do have objection if it is offered for the purpose of a written contract. We are perfectly agreeable to admitting that we agree to what it says in this piece of paper are the terms of the agreement, but we do not want any inference—and I want the record to show this—that that agreement was ever signed.

Mr. Short: Do I understand that you do not object to what has been referred to as the penciled notation as being a part of the agreement between the parties?

Mr. Evans: We do not object to that. We agree that that was a part of the terms of the agreement,

(Testimony of Joe A. O'Reilly.)

but we do not want any inference that it was ever signed.

Mr. Short: The only method I know to get the terms before the Court is to place the document in evidence, and it is so offered.

The Court: You do not accept the limitation?

You offer it as the contract which was in fact executed by the parties?

Mr. Short: Yes, I do, Your Honor.

The Court: The Court does not believe the testimony so far properly authenticates execution of the document by anyone.

Mr. Bernbaum: May I address the Court?

The Court: I prefer to hear Mr. Short.

Mr. Short: In view of the fact that the contents of this exhibit by admission are the terms of a valid contract between the parties in itself would require its admission in evidence. The only significance attached to whether or not it is executed by the parties——

The Court: (Interposing) You have not authenticated it for admission as the executed contract. You may be able to do so by this witness by further interrogation so far as I know, but I am only saying that you have not established execution of it as a physical thing. You have not so established it.

Mr. Short: So there shall be no confusion about it, I have no further evidence on the fact of affixing signatures than that that has already been produced.

The Court: The Court in this connection would

(Testimony of Joe A. O'Reilly.)

deem [27] it material, if counsel were so advised, to inquire of the witness if anything was done by the parties, either one or both of them, pursuant to this thing which is marked Plaintiff's Exhibit 3.

Mr. Short: That evidence will be introduced. There is no question about that.

The Court: Well, the Court will await that evidence before ruling finally upon your offer of that exhibit.

Mr. Short: Very well.

The Court: There are more ways than merely signing a paper to authenticate its coming into being as a thing which may represent or might be contended to represent the contract in question.

Mr. Short: It would be appropriate at this point, I believe, to ask counsel if he will now produce the extract of the minutes of the Bellingham Paper Products Company upon which we have orally stipulated.

The Court: What is the response of defendants' counsel to plaintiff's demand to produce the original of Plaintiff's Exhibit 3. If it has been made known, I failed to realize it.

Mr. Evans: I didn't realize that the Court was calling upon me. [28]

The Court: The Court is reminding counsel for the defendant that there has been a demand repeated in this trial proceeding for the production of the original of Plaintiff's Exhibit 3—as I understand your demand—is that not your intention?

Mr. Short: That is correct, Your Honor.

(Testimony of Joe A. O'Reilly.)

Mr. Evans: We have made a very careful search and a thorough search and say on behalf of my clients we are unable to find any original or any duplicate signed copy of Exhibit 3. We have done everything that we know to do, gone through every file that we can find, and turned the office literally upside down, and we cannot find an executed copy.

* * * * * [29]

Mr. Short: I offer Plaintiff's Exhibit 5.

Mr. Evans: No objection.

The Court: That now is admitted.

* * * * *

The Court: Does that have anything to do with the problem which previously has surrounded Plaintiff's Exhibit 3?

Mr. Short: It does, Your Honor, and I would ask leave to read a portion of it to the Court if I might. [30]

The Court: Does it have some bearing on the authentication of Plaintiff's Exhibit 3 according to your contention?

Mr. Short: It adopts Exhibit 3 by the Board of Directors. [31]

* * * * *

Q. (By Mr. Short): Mr. O'Reilly, in reference to Plaintiff's Exhibit [32] 3 for identification, the so-called agency agreement between yourself and Bellingham Paper Products Company, will you state to the Court what, if anything, was done by you and by Bellingham Paper Products Company in performance of that Exhibit 3? * * * * *

(Testimony of Joe A. O'Reilly.)

The Court: State, if you recall, what, if anything, you did and what, if anything, the Bellingham Paper Products Company did in pursuance of that Plaintiff's Exhibit 3.

A. The Bellingham Paper Products Company erected a paperboard mill on the site of it.

The Court: How long after the coming into being of Plaintiff's Exhibit 3, if you know?

Witness: I think the work was started within two months.

Q. (By Mr. Short): That mill was erected where?

A. On the property of the Puget Sound Pulp and Timber [33] Company directly across the street from the offices.

Q. From the management or head offices of Puget Sound Pulp and Timber?

A. From the main office.

Q. And did that mill contain this machine to which you had reference?

A. The machine was shipped out and installed in the new mill.

* * * * *

(Whereupon Plaintiff's Exhibit 2 is handed to Mr. Short and then to the witness.)

Q. (By Mr. Short): Will you please make note of the date on that bill of sale in which you conveyed the machine to the Bellingham Paper Products Company? [34]

The Court: You do not have to state it. Just do

(Testimony of Joe A. O'Reilly.)

what counsel suggested. Review that statement if you wish to and then proceed.

A. (Peruses Plaintiff's Exhibit 2.)

Q. (By Mr. Short): Have you seen the date of that instrument? If you will, look at the last page.

A. Yes.

Q. Now, in reference to that date when that conveyance was made to Puget Sound Pulp and Timber Company, where was the machine at that time?

A. It was in Watertown or in transit; I am not certain.

Q. Does that bill of sale and the date thereof refresh your recollection in any manner as to the date the machine was physically installed in the Bellingham Paper Products Company building leased from the defendant corporation?

A. The installation was started shortly after this date, August 1946, August 19, and continued on for the major portion of a year before the machine was in operation.

Q. Can you tell the Court how long a time elapsed between the date of that bill of sale in August 1946 and the date that the mill or that machinery actually came into operation, that is, was actually producing paperboard? [35]

A. Approximately ten months.

Q. Can you then fix a date when in your recollection the Bellingham Paper Products Company commenced the production of paperboard in that mill?

A. In May of 1947.

Q. In the year 1947 and up until May, did you

(Testimony of Joe A. O'Reilly.)

receive any moneys from Bellingham Paper Products Company pursuant to Exhibit 3, this agency contract?

The Court: Just look at Exhibit 3, where it speaks of money passing from one to another, and after you have done that, the Court will have you reminded of the form of counsel's question.

A. Yes, I did.

The Court: Read the question.

(Whereupon the last question is read by the court reporter.)

The Court: Is your answer as previously stated?

Witness: Yes. [36]

* * * * *

Q. (By Mr. Short): Then can you now answer the question of what money you received from January 1, 1947, until May 1947 from Bellingham Paper Products Company?

The Court: In relation to what obligation, if any?

Mr. Short: In relation to the agency agreement, Exhibit 3. A. I received none.

Mr. Short: I didn't hear.

The Court: The answer was: "I received none."

Q. (By Mr. Short): Did you receive any moneys from Bellingham Paper Products Company in the calendar year 1947? A. Yes.

Q. Will you state what moneys you received?

A. I received——

The Court: (Interposing) Will you confine it to

(Testimony of Joe A. O'Reilly.)

the moneys mentioned in that contract, Plaintiff's Exhibit 3?

Mr. Short: May I restate the question?

The Court: Yes, you may.

Q. (By Mr. Short): During the calendar year 1947 did you receive any moneys from Bellingham Paper Products Company pursuant to Exhibit 3, the agency contract? A. Yes, I did.

Q. Will you now state what moneys you received?

A. I received remuneration on the basis of three percent of the gross sales.

The Court: Is there anything said in Plaintiff's Exhibit 3 about your right and the Bellingham Paper Products Company obligation to pay you that money? Answer yes or no.

Witness: Yes.

The Court: Just say on what page and what line such a statement is made.

Witness: The lines aren't numbered here, but it is line 11 on the first page of Exhibit 3.

The Court: Now, will you take time to glance through that Plaintiff's Exhibit 3, each and [38] every line and page of it, and after you have done so, the Court wishes to address to you a question as to what, if anything, did you do intending to perform any obligation on your part in that contract and what, if anything, did the other party to the contract do, the performance of which you received as and for performance by the other party to the contract of its obligations therein towards you and

(Testimony of Joe A. O'Reilly.)

for your benefit. Read it through again very carefully.

(Whereupon witness commences to read Plaintiff's Exhibit 3.)

The Court: Have you finished looking through the exhibit?

Witness: Just the first page.

Clerk: Plaintiff's Exhibit No. 6.

(Sales Commissions, etc., marked Plaintiff's Exhibit 6 for identification.)

Witness: I have finished, Your Honor.

The Court: Will you read the last question the Court stated to the witness? [39]

* * * * *

Witness: The company did build the mill as specified and employ me as its agent.

The Court: Did the company pay you any salary for work done by you for it as its agent after that?

Witness: After the operation started?

The Court: After that contract was signed and intended by it and you that your work as such agent was in pursuance of that contract?

Witness: Yes, it did. [40]

* * * * *

Q. (By Mr. Short): Mr. O'Reilly, you have been handed what has been marked for identification as Plaintiff's Exhibit 6. Will you kindly identify what that group of documents is?

A. This is a statement of sales commissions listed under various invoice numbers paid to me by the Bellingham Paper Products Company.

(Testimony of Joe A. O'Reilly.)

Q. And what period of time do those statements cover? Will you go through them for a moment?

A. (Examines Plaintiff's Exhibit 6.)

Q. To rephrase the question, commencing on what [41] date and ending on what date do those statements of commissions cover?

A. They start in May 1947 and go through the first fifteen days of December, 1947.

Q. And is there one for each month intervening?

A. Yes, apparently there is.

* * * * *

Q. (By Mr. Short): Now, Mr. O'Reilly, did you in fact receive a check for the amount shown on each of these sheets as that sheet was furnished to you by the Bellingham Paper Products Company?

A. I believe that I did. These apparently are accurate.

Q. And those were furnished to you by the company, by the Bellingham Paper Products Company?

A. Yes.

Mr. Short: I will offer in evidence Plaintiff's Exhibit 6.

Mr. Evans: May I examine on voir dire? [42]

The Court: Will you, Mr. O'Reilly, say again, if you have already stated it, on what day did you begin work for the Bellingham Paper Products Company in pursuance of the terms and conditions of Plaintiff's Exhibit 3 if you did under those circumstances begin work for that company?

Witness: After rereading that exhibit as you instructed, I find that there was a payment for part

(Testimony of Joe A. O'Reilly.)

time work starting with the first part of 1947—I think it was in January—which went up to a part of May on that \$100.00 basis.

Q. (By Mr. Short): \$100.00 per what?

A. Per week.

The Court: What do you believe to have been the day or the month or the year when you contend that that Plaintiff's Exhibit 3 was executed, if you do claim it was executed by you and by the Bellingham Paper Products Company? [43]

* * * * *

Witness: May 22, 1946, as I recall. * * * * *

Mr. Evans: As to Exhibit No. 6—May I ask the bailiff to hand it to the witness, please?

* * * * *

Mr. Evans: Mr. O'Reilly, I believe what you have in your hand is the record of sales that were made by the Bellingham Paper Products Company during [44] the period of operation up to December 15, 1947, is that correct?

Witness: Yes. * * * * *

Mr. Evans: Do you know who made—do you know [45] whether or not that original ribbon copy that you have in your hand was prepared by Puget Sound Pulp and Timber or Bellingham Paper Products or whether it was prepared by some one on your behalf?

Witness: No. It was prepared by the company, the Bellingham Paper Products Company, in the office of the Puget Sound Pulp and Timber Company. * * * * *

(Testimony of Joe A. O'Reilly.)

The Court: I do not believe that is the question. He still is asking you to be specific in stating your recollection about who made those things. Did you make them or did somebody else, and if so, under what circumstances?

Witness: The accounting department of the Puget Sound Pulp and Timber Company made these statements on behalf of the Bellingham Paper Products [46] Company.

Mr. Evans: And from whom did you receive them?

Witness: I received them from the accounting department.

Mr. Evans: When?

Witness: Well, I would say approximately the dates stated on each one or shortly thereafter.

* * * * * [47]

Mr. Short: I might say I didn't receive these from counsel. These were in my file furnished to me by the witness. Now, if that aids him or aids counsel, that is where I got them—from the witness, the plaintiff.

Witness: In view of these disclosures I would say that these are the papers that I did receive.

The Court: From time to time, at approximately the times stated as a date on each paper, or a day or two or few days after such date, is that what you mean to say?

Witness: Yes, Your Honor.

Mr. Evans: So I might be certain here—then you received the check at the same time for the

(Testimony of Joe A. O'Reilly.)

total amount of your commissions as shown on each one of those pieces of paper?

Witness: Yes. * * * * * [49]

Q. (By Mr. Short): Do I understand correctly now that the exhibit which you have in your hand, Exhibit 6, the commission statements, represents the commissions received by you from Bellingham Paper Products Company during the calendar year 1947? A. Yes. * * * * * [50]

Q. (By Mr. Short): Now, during the calendar year 1947, well, indeed, from any date after June 1946 until December 31, 1947, did [51] you receive any moneys pursuant to Exhibit 3 other or in addition to those commissions to which you have just testified?

A. Yes. Starting in January of 1947 I received \$100.00 a week, and I believe there were some various items of traveling expenses. That is up to the month of May.

Q. That is to say the \$100.00 a week is up until the month of May, is that correct?

A. Yes, including a part of the month of May.

Q. Going back to the \$100.00 a week, during January until a portion of May, 1947, during which you received the \$100.00 a week, is it your contention that that was received pursuant to and under Exhibit 3? A. Yes.

Q. And during the calendar year 1947 did you receive travel expense checks during that entire calendar year, that is from time to time?

A. Yes. * * * * * [52]

(Testimony of Joe A. O'Reilly.)

A. Mr. Roberg was the President of the Bellingham Paper Products Company and Vice President of the Puget Sound Pulp and Timber Company.

Q. And Mr. Turcotte, did he occupy any position with Bellingham Paper Products Company?

A. No, he didn't.

Q. Did he occupy any position with the Puget Sound Pulp and Timber Company?

A. He was the Executive Vice President at that time.

The Court: What company?

Witness: Puget Sound Pulp and Timber Company.

Q. (By Mr. Short): And what position does he now occupy, if you know?

A. He is the President.

Q. Very well. Now, will you please state what you did during the erection of this mill in reference to its erection? Did you play any part in it? If so, state what it was.

A. In addition to consulting with the men that were erecting the buildings and installing the machinery, I formulated the type of materials that we would produce in that mill and compiled price lists for their sale and contacted prospective customers with the idea of selling the board to them when we were in production.

Q. Prior to the installation of this board mill, [55] to your knowledge did the defendant Puget Sound Pulp and Paper Company produce any paperboard whatever?

(Testimony of Joe A. O'Reilly.)

A. No paperboard at all.

Q. So this was a new line, I take it, to their operation, is that correct?

A. Yes, it was.

Q. Now, you specified the type of board to be produced. Without getting into detail of the matter, will you simply state what that involved?

A. Well, it primarily involved paperboard produced from their unbleached natural sulphite and byproduct—a waste byproduct of the mill called screenings—with addition of bleached pulp and various other types of paper-making materials secured from other sources.

Q. Do I gather from your answer that there are different kinds of paperboard, that is different qualities and uses to which paperboard is put?

A. Yes, there are. We contemplated manufacturing approximately fifteen different kinds of paperboard in a variety of thicknesses from 16,000ths to 50,000ths of an inch in the case of every variety.

Q. Now, you testified that you contacted certain prospective customers? A. Yes.

Q. What type of concern is a customer of a paperboard [56] mill.

A. Customers would cover a wide range of varieties. One of our customers was Brown & Bigelow in Milwaukee. Another customer who did place a large order with us for 5,000 tons at \$175 a ton was the Stone Container Company of Chicago. We also sold paper to the Butler Paper Company of Chicago, with branches on the Pacific Coast, the Pa-

(Testimony of Joe A. O'Reilly.)

cific Coast Paper Company in San Francisco and Seattle, and Sierra Paper Company in Los Angeles, as well as paper box manufacturers, and other corrugated box manufacturers.

Q. They are the normal users of what you refer to as paperboard, is that correct?

A. Yes.

Q. Now, during what period of time were you traveling and contacting these prospective customers? Can you specify that?

A. Throughout most of the whole year of 1947 and thereafter. There were trips made during the construction period and after—then during the balance of the year after operations started.

Q. Now, I neglected to ask you when the Bellingham Paper Products Company was organized as a corporation and after you had contributed this machinery and money to which you have testified, were you issued stock in that corporation? [57]

A. Yes.

Q. And how many shares if you recall? And if you can't recall, what proportion of the total shares were issued to you?

A. It was 25% of the total issue. I forget the exact number of shares.

Q. And the remaining 75% were issued to whom?

A. The Puget Sound Pulp and Timber Company. * * * * * [58]

The Court: Plaintiff's Exhibit 6 is now admitted.
* * * * * [59]

(Testimony of Joe A. O'Reilly.)

Mr. Short: I will offer Exhibit 7 which is pursuant to the stipulation on file.

Mr. Evans: No objection.

The Court: Admitted.

* * * * *

Mr. Evans: No objection to its admission.

The Court: Plaintiff's Exhibit No. 8 is now admitted. [60]

* * * * *

Q. (By Mr. Short): Mr. O'Reilly, as you have testified that the last statement of commissions you received, Exhibit 6, was December 15, 1947, why was that month terminated in that manner? What occurred? [61]

A. The Bellingham Paper Products Company, as an independent corporation, was dissolved at that time.

The Court: What month and what year?

Witness: December 15, 1947. [62]

* * * * *

The Court: Do you offer Plaintiff's Exhibit 9?

Mr. Short: I offer Plaintiff's Exhibit 9.

The Court: Admitted. [63]

* * * * *

The Court: Do you offer it?

Mr. Short: I offer Exhibit 10. [64]

The Court: Admitted.

* * * * *

Mr. Short: May I ask leave of the Court to read a portion of Exhibit 9?

The Court: You may. [65]

* * * * *

(Testimony of Joe A. O'Reilly.)

Mr. Short: Now may I read a portion of Exhibit 10?

The Court: You may do that. [67]

* * * * *

Mr. Short: Now, unless counsel wish to now stipulate that the agency agreement referred to in that Exhibit 10 is Exhibit 3 now before the Court and so marked for identification—it was so stipulated in the deposition——

Mr. Evans: No, there is no doubt about the agency agreement. The oral agency agreements is what they were referring to in this exhibit.

The Court: No. Mr. Evans, I understood that Mr. Short's statement referred specifically to Plaintiff's Exhibit 3 when he mentioned agency agreement as the thing that was referred to in this statement that he just read from Plaintiff's Exhibit 10.

Mr. Evans: The terms of it—that is what they were referring to. So far as an executed, a signed agreement——

The Court: May I have that exhibit, and will you point out to the bailiff the words, Mr. Short, that you just read where the words "agency agreement" were used in the exhibit. [72]

* * * * *

The Court: All I see is little "a" within a parenthesis at the top of the third page—these pages are unnumbered—of Plaintiff's Exhibit 10, and it does not point to any physical characteristic of the thing

(Testimony of Joe A. O'Reilly.)

which now bears the Clerk's identification mark of Plaintiff's Exhibit 3.

If there is any evidence of a direct testimonial character which connects that statement with the thing which now bears the Clerk mark Plaintiff's Exhibit 3 for identification, I will be glad to know it.

Mr. Evans: May it please the Court, I think I can clear up something that appears to me the Court is in doubt about.

The defendant admits that we entered into this agreement with the plaintiff, but we never signed the agreement. We do not dispute the terms as they are set forth in Plaintiff's Exhibit 3.

The Court: Do you offer Plaintiff's Exhibit 3?

Mr. Short: I do, Your Honor.

The Court: It is now admitted for any and all purposes of which it is properly capable of being or constituting evidence. * * * * *

Q. (By Mr. Short): Mr. O'Reilly, after December 15, 1947, when the Puget Sound Pulp & Timber Company had taken over the Bellingham Paper Products Company, were your duties with the Puget Sound Pulp and Timber Company any different than [74] those that you had performed for the Bellingham Paper Products Company?

* * * * *

A. No. They were the same.

Q. Generally now, at this period of time, this mill and its machinery are in full operation, are they not?

A. Yes.

(Testimony of Joe A. O'Reilly.)

Q. You have earlier described what you had done in [75] reference to that period of time in which the mill was being set up. Would you now describe to the Court what your function was and what duties you actually performed for the defendant Puget Sound Pulp & Timber Company from December 15, 1947 on?

A. I acted as manager of the paperboard division and mill and hired the superintendent and assistant superintendent, scheduled runs of paperboard to be manufactured, and sold the production of the mill.

Q. When you refer to the paperboard division of Puget Sound Pulp and Timber, is that the same mill and function that Bellingham Paper Products Company occupied during its corporate existence?

A. Yes, it is.

Q. And what was operated by that company became the paperboard division of Puget Sound Pulp & Timber Company? A. Yes.

Q. Now, when you say you scheduled runs, would you briefly explain what that means?

A. From a clean start in the operation of a paperboard mill, the best grades of board are run first. In other words, the whitest type of fibers are used, and from there on it goes down through lower grades of paperboard, winding up with chip board or a similar material [76] made from screenings, at which time the machine and all the equipment is washed up and a new cycle is started—running the various grades, starting with the best quality. I

(Testimony of Joe A. O'Reilly.)

would combine the runs of the various grades and determine what length of time they should run and when the changes should be made of the various grades and when the wash up should occur.

Q. Do I understand that this process runs in cycles then, that you produce the different grades?

A. Yes, it does. * * * * *

Q. (Continuing) —Plaintiff's Exhibit 11. Can you tell the Court what Plaintiff's Exhibit 11 for identification is?

A. These are the statements of commissions paid to me on the sales of the paperboard starting on the 15th of December, 1947, and the last item is under the date of March 11, 1952.

Q. Well, the last item covers what commissions [77] —through what?

A. Through the month of February, 1952.

Q. And as far as you can determine, is there one for each month during those inclusive dates of December 15, 1947 to January 29, 1952, both dates inclusive? A. Yes, apparently there are.

Mr. Short: Before proceeding, I will now offer Plaintiff's Exhibit 11.

Mr. Evans: May I examine on voir dire?

The Court: You may.

Mr. Evans: Mr. O'Reilly, are these the same as Exhibit No. 6 which I have previously examined you about except they cover the period from December 15, 1947 until your termination with the Puget Sound Pulp and Timber Company?

Witness: These cover the payments directly from

(Testimony of Joe A. O'Reilly.)

Puget Sound as the others cover payment from Bellingham Paper Products Company.

Mr. Evans: Are these pieces of paper that were given to you each month which recorded the gross sales and the computations to your commission?

Witness: Yes. [78]

* * * * *

Mr. Evans: And these pieces of paper that you have in your hands are actually the ones that were received by you rather than the copies somebody else made, is that right?

Witness: Yes.

Mr. Evans: Fine.

No objection.

The Court: Admitted.

* * * * *

Q. (By Mr. Short): Mr. O'Reilly, during the period December 15, 1947 to December 31, 1948, what rate or what percentage of net sales were you paid?

A. They were computed at the rate of three percent on the net sales. [79]

* * * * *

Q. Very well. And for the remainder of the period, that is to say from January 1, 1949, to February 29, 1952, at what rate of net sales were you paid?

A. At the rate of one and one-half percent.

The Court: Is that one and one-half percent of net sales? [80]

Witness: Yes.

(Testimony of Joe A. O'Reilly.)

The Court: Did you say anything about three percent a few minutes ago?

Witness: Yes. Up to and including December of 1948 the rate was three percent, these commissions.

The Court: Up to December 1948, and thereafter it was what?

Witness: It was including December of 1948, and thereafter at one and one-half percent.

The Court: You may proceed.

Q. (By Mr. Short): You might briefly explain, if you will, Mr. O'Reilly, what the term "net sales" means, your understanding of that term.

A. The term "net sales" means the selling price of board after freight allowances and discounts.

Q. Very well. Now, can you tell the Court what incident or transaction or conversation prompted the reduction in your commission from three percent to one and one-half percent commencing in January, on January 1, 1949?

A. Well, it was a voluntary reduction or a voluntary temporary reduction.

The Court: Voluntary on whose part?

Witness: Mine.

The Court: And when did that become effective?

Witness: It became effective in January of 1949.

The Court: How much was that reduction? How long did it last and how much was it?

Witness: It was a fifty percent reduction.

The Court: Fifty percent of your one and one-half?

(Testimony of Joe A. O'Reilly.)

Witness: Yes.

The Court: You may proceed.

Q. (By Mr. Short): Did the Court ask you if it was fifty percent of one and one-half?

A. No. I understood——

The Court: (Interposing) Ask him what it is.

Mr. Short: I will ask him.

Q. (By Mr. Short): What was your reduction from January 1, 1949, on; at what percent after January 1, 1949, did you receive commissions?

A. The reduction was from three percent to one and one-half percent.

The Court: You are not talking about anything new from what you previously stated?

Mr. Short: That is correct.

The Court: You previously stated after December [82] 1948 you were paid one and one-half percent instead of three percent?

Witness: Yes.

Mr. Short: That is correct.

Q. Now, did you have a conversation with any representative of Puget Sound Pulp & Timber Company in reference to that reduction? You can answer that yes or no. A. Yes.

Q. With what representative?

A. With Mr. Roberg.

Q. And at that time when that conversation took place, what office did he hold with the defendant corporation?

A. Vice president of the Puget Sound Pulp and Timber Company.

(Testimony of Joe A. O'Reilly.)

Q. And when did that conversation take place?

A. I think it was in December of 1948.

Q. Where would that have taken place?

A. In Mr. Roberg's office at the pulp mill offices.

Q. Were any other persons present at that time?

A. No.

Q. Can you state now the substance of what you said to Mr. Roberg?

A. Well, I said to Mr. Roberg that the profits of [83] the board division weren't very substantial and I said that as a temporary measure I would reduce the commission to one and one-half percent until the operations became profitable.

Q. Did Mr. Roberg say anything in response to that?

A. As I recall, Mr. Roberg said: "That is a nice gesture."

Q. By whom was the subject first raised?

A. It was raised by me.

Q. Was there any proposal by Mr. Roberg or by any other agent of the defendant corporation made conferring any benefit upon you for your willingness to take one and one-half percent?

A. No.

Q. And do I understand that during the ensuing period until February 29, 1952, that was the amount actually paid you?

A. That was the amount actually paid.

Q. In February, on February 29, 1952, your services were terminated with the defendant corporation, were they not?

A. Yes.

(Testimony of Joe A. O'Reilly.)

Q. Can you describe to the Court how the matter of your termination of services with the defendant corporation came about? [84]

A. It was as a result of a purchase of a paperboard machine which I assumed at the time would be installed in the mill building in Bellingham and which was originally built to house two paperboard machines, and——

The Court: (Interposing) Whose purchase? Did you purchase it or did somebody else purchase it? You said it resulted from a purchase. By whom?

Witness: By me.

Q. (By Mr. Short): And when and where did you purchase it?

A. It was in Ottawa, Canada, and I think the purchase took place in 1951.

Q. Incidentally, in reference to that matter, was the building which houses the paperboard machine which you have discussed as being the one in operation at the mill, was that building built in anticipation of being a one machine or a two machine operation?

A. It was built for a two machine operation, and I continually expected to either have the pulp mill buy a machine or bring one to their attention that would be purchased and put in operation there.

Q. Now, you say that your termination came about as a result of your purchase of that machine. Would you continue now and explain about the relationship between [85] that and the matter of your termination?

(Testimony of Joe A. O'Reilly.)

A. Well, through the years I had examined different paperboard machines in various parts of the country, and in the first case they were scarce and high in price and not suitable for this job, and in this particular case I figured the machine very suitable and for sale at a good price to the extent that I personally committed myself to buy the machine.

Then I came to Bellingham and talked to—I believe that I mentioned the machine before going to Ottawa.

Q. To whom?

A. To Mr. Roberg and Mr. Turcotte.

When I came back, I had the machine and explained it and showed the blueprints and specifications to Mr. Turcotte, and he took it under advisement and I think covered the matter with the Board of Directors of the Puget Sound Pulp and Timber Company, during which time probably three months elapsed. He finally told me that they weren't interested in installing it.

That left me with the machine on my hands and the problem of handling it.

The demand for paperboard at that time was twice as great as we could supply, and I conceived the idea of installing the paperboard machine in Central California. I suggested to Mr. Turcotte that I would be able to handle [86] the sales for the paperboard division in Bellingham as well as the subsequent installation in California and handle the sales of that outfit at no injury to the volume or profit of the paperboard division of the Puget

(Testimony of Joe A. O'Reilly.)

Sound Pulp and Timber Company, but Mr. Roberg rather disagreed with that idea, and as a result, we had several different dates of ending our association in mind.

Q. When did those conversations as to your date of termination take place?

A. Well, I would say they were through the second quarter of—that would be 1951. Probably the last one took place about midyear or maybe in August.

Q. In the meantime, what disposition was made of this machine?

A. It hadn't been moved. It was still erected in Ottawa.

Q. Did you ultimately install that machine in California? A. Yes, I did.

Q. Where? A. In Richmond, California.

Q. When, if you recall?

A. Well, that was another operation that took a matter of ten to twelve months, starting about—the building operation I think started there in January of [87] 1951, and I think the mill——

Q. (Interposing) You say “the building operation.” You mean the building of the building that was to house this machine?

A. Preparing the building for the housing of the machine.

Q. And when was the first notice that the defendant Puget Sound Pulp and Timber Company had from you of the fact that you were going to make that installation?

(Testimony of Joe A. O'Reilly.)

A. I don't remember the exact date, but I think it was in the second quarter of 1951.

Q. Well, I will pass that for the moment.

When the subject matter of the date of your termination came up, with whom was that discussed?

A. With Mr. Turcotte.

Q. And that would be when?

A. I think it was about the middle of 1951.

Q. And what date were you suggesting to him as a termination date?

A. I suggested the end of December, 1952, and he suggested I think September 1st of 1951.

Q. And did you ultimately arrive at any accord on what date actually would be the termination date?

A. We arrived at a date of March 1, 1952.

Q. And from mid 1951 until that termination date, [88] where did you occupy yourself or where were you physically during those, well, we will say, eight months?

A. Most of the time I was in California.

Q. Commencing in what period of time did you most of the time maintain yourself in California?

A. Well, I had been there several times previous to, I will say, July 1st, 1951, and a slightly greater percent of the time for the balance of that year and the first two months of 1952.

Q. Now, in reference to the matter—I am now discussing the entire term of your entire contract with the defendant company and to the matter of

(Testimony of Joe A. O'Reilly.)

expenses, when you were paid expense moneys—well, let me preface that with this:

Were you paid expense moneys by Puget Sound Pulp and Timber Company? A. Yes.

Q. The mechanics of your receiving that payment were what?

A. I would turn in an expense account report to the accounting department once a month. They would issue a check for it.

Q. Would they retain that voucher, that list of expenses?

A. I think that they would, yes. [89]

Q. That is you do not now have a retained copy of those things? A. No, I don't.

Q. Was there ever any expense voucher that you submitted to Puget Sound Pulp and Timber Company which was not paid in full by the defendant company?

A. No, there was not. Other than in a case where an error might be made in addition or possibly an item carried from one to the other—in very minor amounts—there never was any objection raised to any accounting for expenses that I submitted to the company.

The Court: Did you get any understanding from anything that was said or anything that was done by the employer as to why it was agreeable to your terminating your services?

Witness: Just in the conversation with Mr. Turcotte about this operation in California. He felt that I couldn't do justice to the paperboard division

(Testimony of Joe A. O'Reilly.)

at the same time as operating the mill in California.

The Court: Had you kept up that connection and that activity all the time that you had been connected with these two concerns here in Bellingham?

Witness: Yes.

The Court: You may proceed. [90]

Q. (By Mr. Short): Mr. O'Reilly, I am not sure how I asked you the last question. Let me now ask you this: Did any person at Puget Sound Pulp and Timber, whether he be officer, director, accountant, auditor, or anyone else, ever make any complaint to you or suggestion to you in reference to any expense accounts you submitted?

A. No person connected with Puget Sound Pulp and Timber Company, either officer or any other person, ever raised a question about the expense items I turned in. [91]

* * * * *

Q. In reference to the installation of this machine in Richmond, was there a company organized to operate that mill? A. Yes, there was.

Q. What was the name of that company?

A. California Paperboard Company.

The Court: Is that the one at Richmond with which you had been connected?

Witness: Yes, Your Honor.

Q. (By Mr. Short): Now, at the outset of your employment with the defendant company and Bellingham Paper Products Company, you referred to your Standard Carton Company in Tacoma.

(Testimony of Joe A. O'Reilly.)

A. Yes.

Q. Was that company in existence and operating during the period that you were also working for Bellingham Paper Products and Puget Sound Pulp and Timber? A. Yes, it was.

Q. Other than those two companies to which you now refer, was there any other company in which you had or acquired any interest during your employment by the defendants?

A. Yes, there was. In the early part of 1948 I was selling paperboard in Portland, Oregon, to the Columbia [92] Paper Box Company.

Q. Did you say "to" or "through"?

A. To the Columbia Paper Box Company from the paperboard division. I was selling board for Puget Sound to the Columbia, a customer of Puget Sound, and they evolved into financial difficulties so that later on they owed us an unpaid balance—by "us," I mean the paperboard division of Puget Sound—of about \$11,000.00, and I found from them that they were interested in selling their business. After negotiating with them for several months I personally purchased that company.

The Court: Beginning when?

Witness: I think it was in October, 1948.

A. (Continued) I operated it as my own personal business and also as a customer of Puget Sound through the balance of 1948 and to, I think, June 1st in 1949, at which time I sold it to California Container Corporation who operated it from

(Testimony of Joe A. O'Reilly.)

then on as—continuing as a customer of the Puget Sound paperboard division.

Q. When you acquired the—what is that name again? A. Columbia Paper Box Company.

Q. When you acquired that company, did you liquidate its indebtedness to the paperboard division of Puget Sound Pulp and Timber Company?

A. Yes, I did. [93]

Q. Did the representatives of the Puget Sound Pulp and Timber Company know of your acquisition of that company? A. Yes.

Q. Who knew, and by what means did he acquire his knowledge?

A. I told Mr. Roberg about it, and I believe that I mentioned it to Mr. Turcotte a couple of times.

Q. Before its acquisition?

A. During the time of negotiations, yes.

Q. Was your interest in any of the three companies you have mentioned ever the subject matter of any objection or dispute between yourself and any representative of Puget Sound Pulp and Timber Company?

A. No, with the exception of the last remarks which I mentioned.

Q. In reference to your opening the——

A. (Interposing) The California Paperboard Company in Richmond.

The Court: Is that the correct identity of the persons to whom you sold the Columbia Paper Box Company?

(Testimony of Joe A. O'Reilly.)

Witness: It is the California Container Corporation, a wholly owned subsidiary of the Container Corporation of America. [94]

The Court: Well, I want to know the identity of the purchaser of the Columbia Paper Box Company.

Witness: The California Container Corporation.

The Court: You may proceed.

Q. (By Mr. Short): Was any decrease in the sales volume of the paperboard division of Puget Sound Pulp and Timber occasioned by any of your activities in reference to either or any of these companies you just mentioned? A. No.

Q. In reference to the mill that you installed in Richmond with the machine that you have described from Ottawa, when did that mill commence production? A. Late in 1951.

Q. Approximately what month would you say?

A. I think November—partial production in November.

Q. And the erection of that mill commenced about what time?

A. Oh, the installation of the machinery began about May or June.

Q. Of what year? A. 1951. [95]

* * * * *

Cross Examination

Q. (By Mr. Evans): Mr. O'Reilly, from your testimony on the stand here, as I understand you became a one-quarter owner of what was the Bellingham Paper Products Company, is that right?

(Testimony of Joe A. O'Reilly.)

A. That is right.

Q. That company was organized with some 2,000 shares of stock, is that correct, and you had 500 of them?

A. I think that is right.

Q. Now, your contribution to that corporation consisted of this machine that you speak of which you valued at \$48,000.00, plus \$2,000.00 in cash, is that correct?

A. Yes. [104]

Q. So then you had \$50,000.00 worth of stock in the Bellingham Paper Products Corporation, is that correct?

A. Well, I wouldn't say that that would be a direct or correct comparison to the value of the stock because at the time the plans of the corporation were to borrow additional money, and for that the stock was pledged, so that as the thing developed, as time went on, the stock would increase in value because of the use of this borrowed money in connection with the operation.

Q. So far as par value of the stock was concerned, at the onset it would be \$50,000.00 worth of stock, is that a fair statement?

A. No, I don't think so.

Q. Well, in any event, \$50,000.00 was all you had in it at the start, is that correct?

A. That is correct.

Q. Now, as I understand, you also received some compensation for your services in helping get the plant in operation before you could actually make any sales, is that correct?

A. Yes, that is right, though during this period

(Testimony of Joe A. O'Reilly.)

there were some commitments for purchases which later resulted in sales.

Q. I see, but you received \$1800.00 as I recall, or some such sum, for your work in helping get the thing [105] organized so that it would produce a product which could be sold, is that not right?

A. If that is supported by the statement, I would say yes.

Q. Then you started drawing commissions, is that correct? A. Yes.

Q. And from then on you were paid on a commission basis? A. Yes.

Q. And that commission basis was three percent of the net sales after deducting freight, is that correct?

A. Yes, freight and any other discounts.

Q. I see, and that went along until the 15th of December, 1947, is that correct?

A. With the Bellingham Paper Products Company, yes. [106]

* * * * *

Q. Now, as I understand, at that time then the Bellingham Paper Products Company as a separate entity went out of business, and Puget Sound Pulp and Timber started running the same plant but as a division of its company, is that not correct?

A. Yes. The Puget Sound Pulp and Timber Company bought the Bellingham Paper Products Company and liquidated it and continued operating the property as the paperboard [108] division of the Puget Sound Pulp and Timber Company.

(Testimony of Joe A. O'Reilly.)

Q. And you went right along performing the same type of services and receiving three percent commission, is that not correct?

A. That is correct.

Q. Then I believe you told us some time in December of 1949 you voluntarily reduced your commission from three percent to one and one-half, is that correct?

A. I voluntarily suggested a temporary reduction of that amount at that time, yes.

Q. So that it was agreeable——

Mr. Short: (Interposing) Excuse me. What time did you state in your question?

Could I have that read?

The Court: It will be read.

* * * * *

Q. (By Mr. Evans): Mr. O'Reilly, I don't want to mislead you. I have the benefit of looking at some records here and you do not. That would have been in December 1948? A. That is correct.

* * * * *

Q. (By Mr. Evans): On January 1, 1949, you were agreeable to receiving one and one-half percent commission—at least for that month—rather than three percent? A. Yes.

Q. Now, it is a fact, is it not, that from January 1, 1949, on through your entire tenure with Puget Sound you continued to receive and did receive one and one-half percent commission?

A. I received the one and one-half percent commission through the balance of the time.

(Testimony of Joe A. O'Reilly.)

Q. Now, as I understand, you have no quarrel about not having received the one and one-half percent? A. No.

Q. In other words, if one and one-half percent was your proper rate, you were paid in full? [110]

* * * * *

A. I was paid the one and one-half percent.

Q. (By Mr. Evans): Now, your claim then here is that we should not have reduced your pay from three percent to one and one-half percent, is that correct? A. In effect, that is correct.

Q. I see. So you are now claiming that for all the period of time from January 1, 1949, through February 1952 you are entitled to an additional one and one-half percent? A. That is right.

Q. Now, you made no demand on anybody for this additional one and one-half percent—at least up until the time you terminated your employment—did you? A. Not a demand, no. [111]

Q. You only suggested it on one occasion?

A. One or two occasions.

Q. Well, now, do you recall your discovery deposition having been taken here March 5, 1954?

A. I do recall it.

Mr. Evans: In fairness to you, perhaps I should ask the bailiff if the discovery deposition might be handed to the witness.

Clerk: What page is that?

Mr. Evans: I will tell him the page. Just hand him the deposition, please.

(Testimony of Joe A. O'Reilly.)

(Whereupon a document is handed to the witness by the bailiff.)

Q. (By Mr. Evans): Will you turn to page 15, please, starting on line 11? I will ask you to pay close attention to the question and answer which I am going to read.

Is it not a fact that the following question was asked of you and the following answer made by you during your discovery deposition:

“Q. So that it is your recollection that the only conversation and the only understanding or agreement made was with Mr. Roberg?

“A. Mr. Roberg. I think that we talked about it. A matter of, oh, four to six months later I [112] suggested that it might be increased. I didn't suggest all the way at that time, as I recall it. Nothing was done about it.”

Now, did you make that answer in response to the question I have just read? A. Yes, I did.

Q. Now, I call your attention to the next question and answer which I will read:

“Q. And was that conversation with Mr. Roberg?

“A. Yes.”

Did that question and answer take place during your discovery deposition? A. Yes.

Q. Now, I will read the next question and answer:

“Q. And do you recall when and where that conversation took place?

(Testimony of Joe A. O'Reilly.)

"A. Well, it seems to me it was along about June of 1949."

Was that question and that answer made during your discovery deposition?

A. That is correct.

Q. And the next two questions and answers which are short and I will read them together:

"Q. About six months after this?

"A. I believe that is about right. [113]

"Q. And what did Mr. Roberg reply?

"A. Well, it wasn't a definite demand. It was more or less a casual conversation and he just,— it just passed by-the-board."

Were those your answers to the two questions I have just read? A. Yes.

Q. Now, as I understand, you tell us that you on two occasions, rather than once, made some suggestion that your pay should be increased to three percent?

A. My recollection of my answer was that I said once or twice.

Q. Well, we just read your question and answer, and it didn't say twice in there.

Mr. Short: No, no.

A. I said once or twice. It resolves itself to be once.

Q. So in fact it was only once that you mentioned it, is that right?

A. That is the way the deposition has it.

Q. Well, that is a fact, too, is it not?

A. To my recollection. [114]

(Testimony of Joe A. O'Reilly.)

Q. And you were under oath when you made your discovery deposition, and you are under oath now, is that not correct?

A. I may have talked to Mr. Roberg as many as six times about this. I am under oath to cite one at least but not all of the times.

Q. So your testimony is now that you only recall mentioning it to him that one time?

A. I don't know that that has to be a definite statement.

Q. Well, what is the fact? How many times did you suggest it and to whom?

A. I am sure of once, and possibly more, to Mr. Roberg.

Q. But you have no recollection of more than once? A. No definite recollection, no.

Q. And that was just casual conversation?

A. As they all were, yes.

Q. So you continued on in the employ of Puget Sound Pulp and Timber Company then at a rate of one and one-half percent from January 1, 1949, until your last [115] check in February 1952?

A. I continued on receiving commissions computed on the basis of one and one-half percent through that period.

Q. And you made no complaint about it?

A. Other than as we have discussed here.

Q. Now, as I understand, along in the latter part of 1950 you became interested in another paperboard mill down in California, is that not correct? A. That is incorrect. * * * * *

(Testimony of Joe A. O'Reilly.)

Q. Will you take a moment and look at A-7 so you can refresh your memory as to its contents?

A. (Peruses document.)

The only reason that I answered as I did is because this company in California didn't exist at that time. You said "interested in a concern in California." [116]

* * * * *

Q. (By Mr. Evans): Mr. O'Reilly, in Exhibit A-7, which is your letter to Mr. Turcotte dated November 24, 1950, you suggested to Mr. Turcotte, did you not, that he purchase some stock in the California Paperboard Company?

A. If and when it is a corporation, yes.

Q. Well, at that time, at the time you wrote that letter, November 24, 1950, you were sufficiently interested in what was later the California Paperboard Company to be soliciting prospective stockholders for money, were you not?

A. Well, in this particular case, the primary reason for the conversation was an allocation for pulp. The suggestion about stock was incidental.

Q. Well, what I am trying to determine is that you were devoting some of your efforts at least as early as November, 1950, towards promoting a paperboard company in California?

A. It was a proposal at that time.

Q. Well, you were devoting your efforts toward promoting a proposed company, is that correct?

A. A small portion of them. [117]

Q. And that company, it was proposed, would

(Testimony of Joe A. O'Reilly.)

be in competition with the paperboard division of Puget Sound Pulp and Timber Company, is that not a fact?

A. This letter discloses the intent. I can read the portions that are relevant if you like.

Q. Well, just answer my question. Is it not a fact that the paperboard company that you were proposing or working on in California would be in competition with Puget Sound?

A. The letter discloses that it was not to be in competition.

Q. Regardless of letters, is that a fact?

A. No. It is not a fact.

Q. They would be manufacturing the same products, would they not?

A. Not the same products, no.

Q. You are certain of that?

A. Yes. The reason I say that is this: That the primary raw materials for manufacturing paperboard in Bellingham are sulphite, pulp and screenings. This mill had no pulp connection whatever. It was a waste paper mill as differentiated from a mill forming paperboard from pulp materials.

The Court: Well, by that, do you wish the Court to understand that the raw materials used [118] at Richmond for manufacture of this paperboard were old waste paper that had been discarded in commerce?

Witness: Yes, such as at the present time the mill is operating strictly on old corrugated cases and kraft papers as raw material—maybe five per-

(Testimony of Joe A. O'Reilly.)

cent of bulk—whereas in the case of the paperboard division of Puget Sound——

The Court: (Interposing) Do both products find a place in the same market?

Witness: The primary purpose of your pulp board is for what they call food board and for food products; whereas the primary purpose of board from waste paper is like for soap cartons and corrugated boxes, things of that nature that are not in contact with food products.

The Court: You may proceed.

Q. (By Mr. Evans): Mr. O'Reilly, it is a fact, is it not, that a substantial portion of the raw materials for the paperboard division of Puget Sound Pulp and Timber is old waste newspapers, isn't that right?

A. I would say up to 40 percent as compared to 95 percent in Richmond.

Q. And is it not a fact that although the two mills [119] might not be making the same kind of product, the two products do compete with each other in the market?

A. You wouldn't use a food board to package soap.

Q. Can you answer my question? A. No.

Q. You can't answer my question?

The Court: I believe his answer was intended to be no.

A. The answer is no.

Q. Now, then, shortly thereafter, as I understand, you and Mr. Turcotte had a conversation

(Testimony of Joe A. O'Reilly.)

wherein he expressed the opinion that you could not successfully represent both this California mill and Puget Sound mill, is that not correct?

A. Yes.

Q. And you began to discuss a date upon which you would terminate your services with Puget Sound, is that not correct? A. Yes.

Q. Now, all this time you had been receiving one and one-half percent commission, ever since the first day of January, 1949, is that not correct?

A. That is correct—on the sales of products of the mill to customers that I developed.

Q. Well, it was on all sales, wasn't it? [120]

A. Yes.

Q. Now, as I understand from your direct testimony you had several conversations about what date you might terminate your services with Puget Sound, is that not correct?

A. That is correct.

Q. Now, you had a proposal of your own that you should be kept on there until December 31, 1952, is that not correct?

A. That is correct.

Q. And I believe Mr. Turcotte had a suggestion that your services should be terminated perhaps as early as July 1951, is that not correct?

A. I don't recall the exact date. I think it is covered in an exhibit.

Q. Well, at least on another occasion, is it not a fact that Mr. Turcotte suggested that your services be terminated on September 1, 1951?

(Testimony of Joe A. O'Reilly.)

A. Again I am not certain of the date.

Mr. Evans: Would you kindly hand to the witness Exhibit A-1, please? [121]

* * * * *

Q. (By Mr. Evans): Now, Mr. O'Reilly, I believe just before the recess you advised us that your California Paperboard Company would not be in competition with the paperboard division of the Puget Sound Pulp and Timber Company, is that what you so advised us? A. Yes.

Q. I believe you advised us that your company in California would be producing boxes for soap and things of that kind as distinguished from boxes for food items?

A. Producing no boxes in either case.

Q. Well, I mean the material for containers of that sort. A. That is correct.

Q. Now, is it not a fact, Mr. O'Reilly, that while you were here with Puget Sound Pulp and Timber Company that you produced several thousand tons of board for I believe making boxes of Tide Soap products? A. That is correct.

Q. Now, that is the same type of board or enters into the same competitive field as the company that you organized in California, is it not?

A. In that light, it would be. However, you may recall a statement I made—that there was a demand for [122] 100% more board than the paperboard division could produce in Bellingham. That is why I make the definite statement that the company wouldn't be in competition.

(Testimony of Joe A. O'Reilly.)

Q. I see. Then you are limiting your statement with regards to competition as to areas as distinguished from competing in the same products, is that correct?

A. There were some products that we couldn't compete in as I have outlined before, and there were some that we could. There are some areas that are desirable from a freight standpoint from one location of a mill and some from the other. That is the reason I made the statement that there would be no competition.

Q. Now, your California company started producing I believe you told us about mid 1951?

A. No. It was November I believe I said.

Q. 1951? A. Yes.

Q. And it took about ten months or so to install the machinery and build the mill?

A. The ten months previous to that.

Q. In other words, somewhere along about January 1, 1951, the California organization really began to come into being?

A. Work was being done down there, yes.

Q. And you were interested in that company at that [123] time? A. That is right.

Q. And you were spending a considerable amount of time down there supervising that work, is that right?

A. I had supervisors on the ground, including an engineer from Ottawa and a superintendent down there.

Q. Well, I am not concerned with what others

(Testimony of Joe A. O'Reilly.)

may have been doing, but you yourself were there supervising?

A. I was not superintending it, no.

Q. Well, you were there a good deal of the time?

A. I was there occasionally, yes.

Q. About how much of the time do you think you spent there?

A. Oh, I was probably in California in that area about a third of the time I guess.

Q. There is an exhibit I believe that was handed to you just before the recess, Exhibit A-1. Exhibit A-1 is your letter of July 12, 1951. Do you recall that letter? A. Yes, I do.

Q. Now, that is a letter you wrote to Mr. Turcotte with regard to your termination date with Puget Sound Pulp and Timber Company, is that not correct?

A. Among other things, that is one of the subject matters there.

Q. Now, I would like to call your attention to the [124] first three paragraphs of that letter. I will quote them:

"There are certain phases of the sales planning and operation of the board mill which I would like to bring to your attention.

"The sales program of this division has been handled in such a way that full production, and shipments of the most profitable grades to the closest customers, should continue throughout this and next year as now arranged.

"Customers, grades and areas have been selected

(Testimony of Joe A. O'Reilly.)

to avoid a competitive impact when new production, either by Container's new Los Angeles machine or California Paperboard in Richmond, comes into the field. This is the result of advance planning going back to last fall and winter."

Have I accurately quoted from the letter?

A. You have.

Q. Now, what do you mean that there has been some advance planning so as to avoid competitive impact when these two new companies come into the field, one of them being your own California Paperboard?

A. There was a backlog of demand for paperboard by the Gypsum, Lime & Alabastine Company which is covered in the next paragraph, and also the Pacific Match Company in Tacoma, and the Pacific Coast Paper Company in Bellingham, [125] which are more desirable customers than any in Southern or Central California for the paperboard division in Bellingham.

Q. In other words, am I correct in that you had been arranging with customers and dividing up the areas as you state in this letter so that when your California Paperboard Company came into operation its customers would be there ready for it in a given area, and Puget Sound would have another area that you had reserved for them, is that right?

A. No, it isn't. This planning was mostly due to the construction by Container Corporation of a mill in Los Angeles which was about to go into production then. The planning in this area of the

(Testimony of Joe A. O'Reilly.)

various products for the various customers took that into account, because the Los Angeles plant of the Container Corporation had been a major customer of the paperboard division.

Q. Well, tell me specifically what do you mean by the words:

“* * * grades, and areas have been selected to avoid a competitive impact when new production, either by Container's new Los Angeles machine or California Paperboard in Richmond, comes into the field.”

What do you mean by those words—“to avoid a competitive [126] impact”?

A. I meant to court the customers that are most desirable for the mill in this area, which we were doing—which I was doing—on behalf of Puget Sound at that time, primarily because of the construction of this mill in Los Angeles which would take away actually our major customer tonnage-wise. I felt that I had board placed in these different places that I have mentioned.

* * * * *

Q. (By Mr. Evans): Now, Mr. O'Reilly, in the last two paragraphs [127] on the first page of your letter you begin to make reference to a proposed date of termination, do you not? I will quote this, and you follow me, please:

“During this time it has been necessary for me to make promises, estimates and virtual commitments covering the balance of this year and thru next year. I have been telling everyone that I'll

(Testimony of Joe A. O'Reilly.)

continue to handle Puget Paperboard sales even after California Paperboard starts production.

"Your suggestion that I drop this as of October, or when California Paperboard starts producing, does not seem in the best interest of all concerned. As you want me to leave, and I have numerous customers who are looking to me for their needs thru next year, I believe December 31, 1952, would be the best separation date."

Have I quoted that correctly?

A. You have.

Q. Now, you are proposing I presume in that last paragraph that the separation date be December 31, 1952, is that the import which you were trying to put over? A. That is right.

Q. Now, on the second page, do I understand correctly here that you are setting forth the reasons why [128] you should have that long a period of time before your termination date? Particularly I call your attention to the fourth paragraph on page 2, which I will read:

"As you know I voluntarily reduced my sales commission from 3% to 1½" in January of 1950. This till now covers an 18 month period and the next 18 months on the same basis brings up the proposed termination date."

Have I read correctly what it says in the exhibit?

A. You have read correctly though there are two errors in that paragraph.

Q. Yes, that is what I want to come to next.

Now, there is one error in that it was actually

(Testimony of Joe A. O'Reilly.)

January 1, 1949, that you voluntarily cut your commission rather than January of 1950, is that right?

A. 1949 is the year referred to, yes.

Q. So that should be, instead of 18 months, 30 months in which you had been operating and receiving a one and one-half percent commission rather than the three percent, is that not correct?

A. Receiving a commission portion of one and one-half percent, yes.

Q. For 30 months rather than for 18 months?

A. That is correct.

Q. Now, was there some other error as to that paragraph, [129] not as I read it, but factual-wise?

A. Well, the commission, to quote a section of the first sentence—"from 3% to 1½" in January"; that is an error.

Q. And it should be a percent sign instead of an inches sign?

A. That is correct. [130]

* * * * *

Q. (By Mr. Evans): Now, actually you did arrive at an oral termination date with Mr. Turcotte of the last day of February, 1952, is that not correct?

A. That is correct.

Q. And there is no quarrel about that being the date that your services were terminated, is there?

A. No quarrel about that.

Q. Now, this oral conversation that you had with Mr. Turcotte during which you agree upon a termination date as of the last day of February, 1952, occurred after you wrote the letter of January 12, 1951, is that not correct?

(Testimony of Joe A. O'Reilly.)

A. The date on this letter is July 12, 1951.

Q. Excuse me. It occurred after that date?

A. It occurred after that date.

Q. Now, you left the vicinity of Bellingham some time shortly after Sept. 1, 1951, did you not?

A. Oh, I left Bellingham many times previous to that and also have returned many times since.

Q. Well, you actually cleaned out your desk and left the premises of Puget Sound physically at least some time shortly after the first of September, 1951, is that not a fact? [132]

A. Some time after the first of September 1951, that is correct.

Q. At least prior to the middle of September 1951, is that not correct?

A. I wouldn't say that, no.

Q. Well, at least prior to the first part of October 1951?

A. I believe that would probably be right.

Q. And you went down to California at that time, is that not correct? A. Yes.

Q. Now, your being in California, you were not available to get your commission checks by some one handing them to you, that is a fact, is it not?

A. Yes.

Q. So they were being mailed to you?

A. Yes.

Q. Now, you had a little delay in receiving some of your commission checks, did you not?

A. I believe there was one or so that was late.

* * * * * [133]

(Testimony of Joe A. O'Reilly.)

Q. (By Mr. Evans): Now, I would like for you to refer to Defendants' Exhibit A-2 which I believe is your letter of November 21, 1951, addressed to Mr. Turcotte, is that not correct?

A. Apparently it is, yes.

Q. I will read it and you watch the copy you have.

(Whereupon Mr. Evans read to the witness in its entirety Defendants' Exhibit A-2.)

Q. (By Mr. Evans): Have I read the letter accurately? A. Yes.

I was wondering why the lower portion of this letter has been removed—if I might ask that question. One-third of it has been torn off apparently.

Q. That is the letter that you sent I believe?

A. It is two-thirds of it.

Q. Now, was there any more of it? We can't find the rest of it. How it got torn off we can't tell. Can you enlighten us as to what was said, if anything, on the rest of it or was it just a blank sheet of paper?

A. I don't know. There might have been a post-script. That is the only reason I raise the question.

Q. Do you have your carbon copy of that letter?

A. I don't know whether I do or not. I haven't looked for it. [134]

Q. Well, that is the copy that was shown to you two days ago, was it not? A. This one?

Q. Yes. A. A photostat of this was.

Q. Now, in this letter of November 21, you make

(Testimony of Joe A. O'Reilly.)

no demand for anything in addition to one and one-half percent on your commissions, do you?

* * * * *

A. No, I do not.

Q. (By Mr. Evans): As a matter of fact you come right out and state:

"As I recall our agreement, a 1½% commission on boardmill sales would be paid me for six months, starting with the first of September."

A. That is what the letter states. [135]

* * * * *

Q. (By Mr. Evans): In other words, you knew that Mr. Turcotte was under the impression from his conversation with you that that was the only obligation he had to you, isn't that correct?

A. No.

Q. Well, then, why did you state in your letter:

"As I recall our agreement, a 1½" commission on boardmill sales would be paid me for [136] six months, * * * ."

A. That was the portion he had been paying me, and it was to continue for that period.

* * * * *

Q. (By Mr. Evans): Now, is the Exhibit A-3 that you have in your hand a letter of April 7, 1952 written by you to Mr. Turcotte?

A. Yes, it is.

Q. Now, that letter addressed to Mr. Turcotte states:

"Apparently your staff has overlooked sending

(Testimony of Joe A. O'Reilly.)

me the commission check for February, we had agreed that this would be the last one."

That is what it states, is it not?

A. That is what it states.

Q. Now, you meant what you said there, did you not?

A. I meant what I said there, but I didn't [137] imply that that would be the completion of the obligation of Puget Sound Pulp and Timber Company to me.

Q. Oh, I understand. The rest of your money you would receive in pulp wood or in cash rather than by check, is that what you mean?

A. I would take it in any way; I would prefer a check, however.

Q. Then, why did you state in this letter:

"* * * we had agreed that this would be the last one."

A. The last check at one and one-half percent, the portion of one and one-half percent. This would complete the period of time to the separation date that we had agreed on.

Q. Then you really didn't mean that this would be the last one? You just wrote this letter?

A. I meant this would be the last one, but I didn't mean it would be the last money that Puget Sound would give me.

Q. You made no demand for any additional moneys, had you?

A. Other than we have discussed.

(Testimony of Joe A. O'Reilly.)

Q. That was your conversation with Mr. Roberg in June or July of '49? A. Yes. [138]

Mr. Evans: Now, will you kindly hand the witness Exhibit A-4?

(Whereupon Defendants' Exhibit A-4 is handed to the witness by the bailiff.)

Q. (By Mr. Evans): It has been previously stipulated that that letter is a carbon copy of the one sent to you by Mr. Turcotte on April 8th. Do you have that letter in your hand?

A. I have the carbon copy of the letter.

Q. That letter states:

"Enclosed herewith is our check together with statement covering sales in the Board Division for the month of February. This completes our commitment to you as previously agreed upon.

"I hope everything is going well with your new venture, and remain,

"Yours sincerely,

"L. Turcotte"

Have I correctly read the letter?

A. You have. I don't consider the word "commitment" meaning obligation, however.

Mr. Evans: Kindly hand the witness Exhibit A-5.

(Whereupon Defendants' Exhibit A-5 is handed [139] to the witness by the bailiff.)

Q. (By Mr. Evans): You received Exhibit A-5 with the letter of April 8, did you not?

A. Yes.

(Testimony of Joe A. O'Reilly.)

Q. And you cashed that check thereafter and spent the money since?

A. Well, I probably spent the money but—at this time, I probably deposited it rather than cashed it.

Q. Well, now, you knew, did you not, Mr. O'Reilly, when you received the letter from Mr. Turcotte dated April 8, 1952, enclosing the check, stating:

“This completes our commitment to you as previously agreed upon.”

You knew that Mr. Turcotte understood this was the last money that was due you, is that correct?

A. No, I don't understand that.

Q. What do those words—“This completes our commitment to you as previously agreed upon.”—What do those words mean to you?

A. Commitment as to the period of time when commissions would be paid.

Q. I see, and you understood them so to mean?

A. What was that?

Q. You understood those words to mean that which [140] you have just told us? A. Yes.

Q. And I suppose the same as you understood in your previous letter of the day before which you had sent to Mr. Turcotte that this would be the last one that you knew he would understand that you really didn't mean it would be the last check, is that correct?

A. The last check for one and one-half percent.

(Testimony of Joe A. O'Reilly.)

Then, of course, I expected to get the other one and one-half percent for all this period of time.

Q. I see. Now, there was no more correspondence took place between you and Mr. Turcotte about this subject until about June of 1953, isn't that correct?

A. Without agreeing to that exact date, I would say it is about correct.

Mr. Evans: May I ask that the witness be handed Exhibit A-6, please?

The Court: That will be done.

(Whereupon Defendants' Exhibit A-6 is handed to the witness by the bailiff.)

Q. (By Mr. Evans): Now, your letter of June 5, 1953, which is Exhibit A-6 is one sent by you to Mr. Turcotte, is it not? A. Yes, it is.

Q. And is it not a fact that that is the first [141] demand that you ever made for anything over and above your one and one-half percent commission from January 1, 1949, on through?

A. It is the first formal demand.

Q. It is the first formal demand you made?

A. That is right.

Q. In other words, you let Puget Sound Pulp and Timber Company pay you at one and one-half percent from January 1, 1949, right on through your termination date thinking that that was all they owed you, and you first raised the question over a year after you leave their services?

Mr. Short: This is argumentative.

The Court: The objection is overruled.

(Testimony of Joe A. O'Reilly.)

Q. (By Mr. Evans): Isn't that correct?

A. Those times are correct, yes. [142]

* * * * *

Q. Mr. O'Reilly, isn't it a fact that you did not return to Bellingham after you left in September until after February 29, 1952? [143]

* * * * *

A. I have already said that it was not a fact.

Q. (By Mr. Evans): Now, in your operation of running this mill, you had to be in frequent contact with the superintendent, is that not correct, that is prior to the time of your separation?

A. Oh, I would say that our cycle of operation ran from twenty to thirty days, and I would be in contact with them usually at that time, at least that often.

Q. Well, isn't it a fact that you frequently only scheduled operations for about two or three days in advance?

A. No, that is not a fact. These were changes that were subject for a period of two or three days—depending on developments.

Q. In other words, it was essential that you know what kind of board they were producing in order to be able to know whether you could fill an order, isn't that correct?

A. The orders came first, the board production afterwards. We didn't make board for inventory; we made them to fill orders.

Q. Well, unless you were in touch with the mill and knew what their situation was, you could not

(Testimony of Joe A. O'Reilly.)

make a commitment that you could fill an order, could you?

A. Not very well. Naturally in this period [144] Mr. Turcotte had designated somebody else to gradually take over this programming work so it wasn't the same burden to me that it was before. That naturally follows. This obligation or service that I had done was gradually relinquished.

Q. So during the period from September through the last day of February, 1952, your services that you performed, if any, for Puget Sound were rather limited?

A. They were mostly connected with contacts with customers, answering questions that were put to me about various grades of board that it would be possible to make in Bellingham and what the characteristics were, things of that nature, yes.

Q. You weren't doing any selling because you weren't close enough to the mill to know whether they could produce the product you might want to sell, isn't that correct?

A. The sales being consummated were to customers that I had developed.

Q. But you were not actually making sales? You couldn't take an order, could you?

A. I actually was instrumental in getting orders to Bellingham as late as the middle of 1952, after I had left the service. I had a very friendly feeling for the paperboard division and did everything I could to aid [145] them in any way in connection with the customers.

(Testimony of Joe A. O'Reilly.)

Q. But you could not take an order after you left here, could you?

A. My orders were all subject to approval and acceptance and acknowledgment by the mill. I never during the whole period of time took an order as such myself.

The Court: It would be better if you answered the question directly.

A. Well, I would say no more so than I did before then.

Q. As a practical matter you didn't take an order—didn't have an order filled—from the time you left here in September of '51 through the period that you were actually paid?

A. The same condition existed as I outlined before. Some of those customers were on contract for a given number of tons per year, and I think that those were contracts that I was instrumental in having written, and I think they continued on through the full year of 1952 at least.

Q. Well, what do you mean by "instrumental in having written"? Do you mean that you suggested maybe they might buy it from Puget Sound, or something like that?

A. I had been selling them board on a certain basis for Puget Sound over a period of time, and I suggested that they would have a better position with the supplier [146] if they would enter into a contract for a given number of tons per year or per quarter or per month, as the case may be, which

(Testimony of Joe A. O'Reilly.)

would carry on. In other words, all of those contracts had what I term an evergreen clause.

Q. You never made any reports to Puget Sound or their officers about what you were doing, did you?

A. I never made any reports at any time.

Q. In other words, they were completely ignorant of what you were doing during this period of time, isn't that a fact?

A. As well as in the years previous, other than casual discussions from time to time.

Q. Well, in the years previous you were the manager, were you not, of the paperboard division?

A. Yes, but I wasn't making reports to anyone other than verbal conversations occasionally.

Q. You are quite certain that you were not making any written reports at any time as to the operations?

A. Not periodically, not in the way that you implied.

Q. Well, I don't care whether they are periodic or whenever they need to be made?

A. Well, I probably made two or three reports during the three or four year period.

Q. In fact, you committed to writing every time you thought it deserved the attention——?

A. No. I would have been writing continually if [147] I had done that.

* * * * *

Q. (By Mr. Evans): Mr. O'Reilly, you are being handed what has been marked for identification

(Testimony of Joe A. O'Reilly.)

as Defendants' Exhibit A-9. I wish you would kindly look at those if you have not already seen the photostatic copies I have given your counsel and advise me whether or not those are two reports that you submitted to Mr. Turcotte some time during the year 1951, perhaps the year before or the year after. Do you recognize them as such?

A. These are reports that I made, but not as reports of the operation of the mill. They are suggestions [148] for additions to the operation in both cases.

The Court: Do you know what year?

Witness: There is no year stated so it could be at any time during that three year period or even later.

Q. (By Mr. Evans): So those are types of reports that you did make from time to time when you considered it appropriate, is that correct?

A. These are apparently the only reports or you would have more I am sure.

Q. Those particular reports have been presented to you there, and I want to know if that is the type of report—

A. (Interposing) These are the reports.

Mr. Short: May I—

The Court: (Interposing) The question has been answered.

Mr. Evans: I offer Exhibit A-9.

Mr. Short: I will object to the offer upon the ground and for the reason that it is utterly immaterial.

(Testimony of Joe A. O'Reilly.)

I was about to interrupt counsel's progress in this line of questioning because he is completely misleading the witness and, therefore, the Court when [149] he purports to impeach the witness by these written reports when the question he was asked—that is, the witness was asked—was whether or not he made any reports to the company of his activities in selling customers and writing these alleged evergreen contracts, and in an attempt to both mislead the witness and anyone else present he produces reports not of selling but how the mill is physically functioning and the suggestions of this witness to improve the functioning, attempting by that process to contradict the witness when they perform no such purpose whatever, and the offer is strenuously objected to as being completely irrelevant and not purporting to impeach the witness in any particular.

Mr. Evens: I am sorry if I have misled counsel or the witness or the Court. I just happened to notice in my notes that I intended to at least make an offer of those two exhibits, and when I said "report," it reminded me I should have gotten them in. I had no intention of those being connected with the line of questioning I had just before, and I apologize if I have misled either counsel or the Court or the witness, because it was not my intention. [150]

The Court: What do you offer them for then?

Mr. Evans: For a type of report—to see whether this witness admits that they are reports he made.

(Testimony of Joe A. O'Reilly.)

By a later witness that I will call I will tie them in further, but for identification this is the only way I could do it was to present them to this witness.

The Court: Do you withhold the offer of them at this time?

Mr. Evans: I will offer them again later. I have gone through the motion of offering them at this time. I didn't know what counsel's attitude would be.

The Court: The Court will reserve ruling until further proof has been received.

Q. (By Mr. Evans): Now, Mr. O'Reilly, let's go back to the period from September 1951 through February 1952, as I understand you were sort of a roving ambassador contacting various peoples who had purchased or expected to purchase supplies from the Puget Sound Pulp and Timber Company, is that correct?

A. They were purchasing at the time.

Q. They were the same sort of people that you expected to do business with when you got the California Paperboard Company in operation, is that correct? [151]

A. No.

Q. Well, now, the advice you were giving them and the work you were doing is absolutely lost to Puget Sound unless someone in Puget Sound knows about what you are doing, isn't that correct?

A. I wouldn't say that.

Q. Then it is your understanding that you can go down and talk to the customers and make agreements with them, commitments, et cetera, and never

(Testimony of Joe A. O'Reilly.)

tell your employer a word about it, and that is going to be of some benefit to your employer?

A. You apparently aren't quite conversant with the procedure. I can see how you might arrive at that conclusion. These customers were buying board for specific purposes. I wasn't making commitments to them or committing Puget Sound to them. Various types of board are possible to be made on certain types of equipment. I have a very thorough knowledge of that.

A lot of the customers of Puget Sound still look to me for information about paperboard, not about specific orders or commitments of Puget Sound or orders that they imply they will place, general knowledge, the same as I have given them through all of this period of time.

Q. Well, as I correct in this much: That you at no [152] time reported to Puget Sound on anything that you had done after you left here in September of 1951?

A. I didn't report to them at that time or at any time previous. In most cases orders that I would discuss with the customer would be mailed directly to the mill rather than brought in by me, and that was the same procedure that followed through this period.

Q. Now, I would like to go back to the period just preceding that—from the time that you began to promote and become interested in the California Paperboard Company, is it not a fact that you were soliciting the customers of Puget Sound Pulp and

(Testimony of Joe A. O'Reilly.)

Timber Company for stock contributions in the new company you were organizing?

A. No. I offered opportunities to some of them in the area down there. I had already covered my plans about the distribution of territories, et cetera, in my information to Mr. Turcotte previously. Nothing I did was in violation of anything that I told him or any plans that I had outlined.

Q. In other words, as I understand, you did not solicit them to buy stock in your new company? You let them have some, is that right?

A. If some were interested, yes.

Q. One customer, as I recall, you let him have \$20,000.00 worth, Mr. Enmons, or some such name.

A. Well, "let him have" and "stocks" are two things that aren't exactly right. He never did own any stock in the California Paperboard Company.

Q. Well, he put up \$20,000.00 toward getting it in operation, didn't he?

A. Well, he let me have the use of the money but not for stock in the company.

Q. It was for the purpose of putting California Paperboard in business?

A. It wound up in that endeavor, yes.

* * * * *

Q. Now, as I understand, Mr. O'Reilly, during the time that you were connected with Puget Sound Pulp and Timber Company and its predecessor, Bellingham Paper Products Company, you received a total in commissions of something in excess of \$110,000.00, is that correct?

(Testimony of Joe A. O'Reilly.)

Mr. Short: Objected to as utterly immaterial if the Court please.

Mr. Evans: I believe I should be permitted to go into any claim on quantum meruit that might come out of this. If an employee suing on a contract can prove [154] and if his evidence shows an action on the point of quantum meruit, he can recover under it even though he has not pleaded.

Mr. Short: Nobody ever suggested the plaintiff in this action was suing on the claim of quantum meruit, and furthermore, there is in evidence this Exhibit 6 and those two that total every dime that this witness got, every dime from either company, and it went in without objection, and it is a part of the stipulation.

Now, the only purpose that counsel has by totaling a person's income over a series of years is to try to make a showing that because it is a six digit figure he ought not to be here suing for anything.

The Court: Is it already in evidence?

Mr. Short: It is.

The Court: Are the items already in evidence in detail?

Mr. Short: Yes.

The Court: The objection is overruled. He can ask him the total of it if he wishes. [155]

* * * * *

A. I think the figure is stated there, and I have no argument about the figure stated in that document.

Q. (By Mr. Evans): And in addition to that,

(Testimony of Joe A. O'Reilly.)

you received \$135,000.00 for your \$50,000 capital investment?

Mr. Short: Same objection if the Court please.

The Court: Overruled.

A. If the figures are stated there, I don't disagree with them.

Q. Making a total of something slightly under \$200,000.00 net to you during this less than six years [156] you were with these companies?

Mr. Short: May I have a running objection to this type of question?

The Court: Yes, you may, and it is overruled.

A. I think those figures are correct; if that is the total, I will agree with them.

Q. Well, then, as I understand from your counsel's objection, you have no complaint that you were underpaid for the work that you did, is that correct?

A. Yes, I do have a complaint or this action would not be in operation here. * * * * *

Q. Now, in addition to this work that you were doing for Puget Sound, you were also running another box company as I understand it down in Portland?

A. I did for a period of time, as I stated.

Q. And in addition to that you were running some sort of a paperboard company in Tacoma?

A. In the start, that was the case. It wasn't a paperboard company. It was the Standard Carton Company which did own and operate a paperboard mill.

(Testimony of Joe A. O'Reilly.)

Q. So in reality, at various periods of time during this six years you were literally the manager and operator [157] of three different companies?

A. That is right.

Q. And you received an income for your services in all three of them, isn't that right?

Mr. Short: Objected to as utterly immaterial.

The Court: Overruled.

A. Yes. * * * * *

Q. (By Mr. Evans): Mr. O'Reilly, calling your attention back to the time when you went in Mr. Roberg's office and voluntarily reduced your commissions from three percent to one and one-half percent, as I recall you advised us that the company wasn't doing very well at that time, is that correct?

A. Not as well as it could have been doing, that is correct.

Q. And you were well aware that the Board of Directors of not only Bellingham Paper Products Company but also of Puget Sound knew the company wasn't doing well, too, isn't that a fact?

A. They were aware of that fact. [158]

Q. And it was a matter of some concern of everybody that had anything to do with the operation of those two companies, isn't that a fact?

A. It was of some concern.

Q. As a practical matter, it was even thought by some and perhaps even by you that it might be necessary to close that paperboard mill down, isn't that correct?

A. No, it is not.

Q. It isn't?

A. It is not.

(Testimony of Joe A. O'Reilly.)

Q. But in any event the situation was bad enough that you were willing to voluntarily reduce your commissions?

A. Well, I made the suggestion of taking a lesser amount for a period.

Q. A period that you did not stipulate?

A. That is right.

Q. Now, something that I am a little confused about—As I understand, you went back to Ottawa and bought another paperboard machine?

A. Yes.

Q. And you bought it on your own, is that correct?

A. Eventually, yes. I discussed the paperboard machine with Mr. Roberg and Mr. Turcotte before doing that.

Q. But nobody from Puget Sound authorized you to go back there and buy a paperboard machine for them, did [159] they? A. No.

Q. It looked like such a good buy to you that you just couldn't leave it alone or something to that effect, isn't that right?

A. Something to that effect is correct, yes.

Q. Now you recall when you went back?

A. I don't actually.

Q. Well, would it have been prior to the time when you proposed to Mr. Turcotte in your letter I believe of November 24, 1950, that he invest some money in the California paper company?

A. It would have been prior to that, yes.

(Testimony of Joe A. O'Reilly.)

Q. So you had gone back there and you already had the machine?

A. I didn't buy the machine when I was back there.

Q. You just went back to look at it and were negotiating, is that right?

A. Negotiated and talked about it, either.

Q. So the fact that Puget Sound did not install that machine after you had purchased it was not a shock to you, was it? In other words, you already knew they weren't going to put it in, didn't you?

A. No, I did not. It wasn't exactly a shock because it developed gradually. I felt quite confident they would [160] put it in because they had a mill building provided to accommodate it, and it would have made a considerable amount of money for them if they had put it in.

Q. Well, as a practical matter, the present board mill takes care of all the materials they can produce any how?

A. No, that isn't so. Actually at this time a new type of board was being sold on the market called bleached kraft which came into very popular use, and at this time Puget Sound was also bleaching their sulphite. It would have been possible to run all the tonnage over that new machine that could be produced on it and sold in the field that this new board is supplying. It wouldn't have been quite as strong as the kraft, but in most cases it would be suitable for the job.

Since that time, the Potlatch Industries in Lew-

(Testimony of Joe A. O'Reilly.)

iston, Idaho, have added a second machine which would have about three times the capacity of this proposed machine. Weyerhaeuser Timber Company has installed a machine for the same purpose, which is producing about three times as much as this proposed machine would have done.

We could have moved right out and run bleached sulphite over that machine and sold it at the price established by Potlatch Industries, which was \$185.00 for board in rolls and \$200.00 for board in sheets, as compared as [161] I recall it with \$135.00 to \$140.00 for the pulp, which would have given a good profit for the conversion of the pulp into board and a ready market for the product.

Q. But in any event the officers of Puget Sound did not elect and indicated to you they did not wish to invest in another machine, isn't that correct?

A. That is right.

Q. And it was their prerogative, was it not, to make that decision?

A. They certainly did have that right.

Q. So then your complaint is rather a criticism of their judgment rather than any wrong they have done you, isn't that correct?

A. Well, after living with an operation for three years and assuming that you are going to have a second machine in that mill, it was a considerable disappointment. I wouldn't say it was a wrong done me, but it makes the whole operation look much worse than if the machine had been installed and put into operation.

(Testimony of Joe A. O'Reilly.)

The machine is now making a profit of at least \$30.00 a ton on the board it produces. The profit would have been greater in Bellingham.

Q. What it amounts to then is that you were disappointed that your employer refused to expand his plant?

A. I was disappointed that my employer changed [162] his mind about his dedicated intention when the mill was built,—when a good opportunity to do that presented itself.

Mr. Evans: No further questions.

The Court: Any further questions? Did you wish to ask of the witness any questions on redirect?

Mr. Short: Yes, Your Honor.

Redirect Examination

Q. (By Mr. Short): Mr. O'Reilly, just prior to your signing Exhibit 1 of May 22, 1946, with the Puget Sound Pulp and Timber Company, I believe you testified you were then self-employed with the Standard Carton Company in Tacoma, is that correct? A. Yes.

Q. What was your average annual income from that business just prior to going with Puget Sound Pulp and Timber Company?

Mr. Evans: Object to as to materiality.

The Court: The objection is overruled.

A. In years previous to and including 1950 I had made as much as \$40,000.00. At the time of leaving Tacoma, as I recall it, we were making

(Testimony of Joe A. O'Reilly.)

\$14,000.00 a month at the [163] Standard Carton Company.

Q. And you went into this venture with the Puget Sound Pulp and Timber Company and its subsidiary, the Bellingham Paper Products Company, in anticipation of having a two machine operation at the Bellingham Paper Products Company?

Mr. Evans: Objected to as being leading.

The Court: Sustained.

Q. (By Mr. Short): How many machines did you anticipate that the Bellingham Paper Products plant would have in it?

Mr. Evans: Objected to as not being material, Your Honor, as to what he might have anticipated. What was agreed to, or something like that, is a different problem.

The Court: Would you not have to show some connection of the other party to the arrangement in the employment?

Mr. Short: Well, the connection is a little bit obvious. They built a two story building to operate two machines in it. This man sacrificed his then business to go into a venture to produce a certain sales volume, three percent of which would constitute his income.

The Court: He can state what they said on [164] that subject, if you think they said anything, but the objection is sustained.

Q. (By Mr. Short): What was said at the outset by a member of the Puget Sound Pulp and

(Testimony of Joe A. O'Reilly.)

Timber Company as to the anticipated number of machines to be used in this operation?

A. My original suggestion was for a one machine mill and a smaller building, but as it developed the Puget Sound people decided on a two machine building which would eventually house two machines, and to put this one machine into it; so naturally that was the dedicated ambition or intention.

The Court: The Court does not regard the answer as responsive. I thought you were going to ask him what was said by his employers or some one speaking for them. Wasn't that what you intended?

Mr. Short: Yes.

A. (Continued) Well, I said: "Let's build a one machine board mill," and I think Mr. Roberg said, after discussing it with his engineering department and various others, that the mill building should be erected for two machines, the second one to be added later, which would naturally increase very greatly the cost and overhead of the operation of one machine in that setting and, also, [165] would indicate a definite plan to install a second machine to bear that burden of overhead.

Q. When you first began negotiations with the Puget Sound Pulp and Timber Company, was it for the construction of a building for yourself with one machine or for Puget Sound Pulp and Timber Company? A. It was for myself.

(Testimony of Joe A. O'Reilly.)

Q. And was that to be operated as part of the Standard Carton Company?

A. I don't believe that it was contemplated that way. It could or could not have been.

Q. But it would be owned by you whatever name you employed? A. That is right.

* * * * * [166]

Q. (By Mr. Short): Mr. O'Reilly, when those negotiations became [167] converted into the suggestion that a board mill be erected by Puget Sound Pulp and Timber Company, what was then discussed as to how many machines would be then operated in that building?

A. The various merits of one and two machine mills were discussed, and it was decided that two machines would be eventually put in operation in the paperboard mill building.

Q. And was the building designed for purposes of accommodating two machines?

A. Yes, it was.

Q. Would you briefly describe the size—well, the machine that actually went into the building, the paperboard machine that you got at Watertown, what was the size? How much room does such a machine occupy?

A. Well, a paperboard machine is quite a large unit. That machine would require about twenty railroad cars to transport it out here, and when erected on the floor it would have a length of about 180 feet. Approximate width, including the gears and drives on the back, would be 15 feet on the floor.

(Testimony of Joe A. O'Reilly.)

An elevation of 16 to 18 feet through the dryer section.

Q. And does that accommodate a continuous process from one end to the other?

A. Yes, it does. [168]

The cylinder molds have a face of 74", and the dryers, 6' or about 72" wide. As the shrinkage occurs during drying, the final width of the sheet produced is 66".

Q. And the tonnage capacity of that machine that was actually installed is approximately what?

A. The tonnage capacity of a paperboard machine is usually rated at one ton per inch, so, operating at 100% efficiency, it would be 66 tons in 24 hours. The operations start out on a basis of maybe 50% of that and probably have attained 80% of efficiency at the present time.

Q. There was some testimony on your cross examination in reference to your disappointment in the failure of Puget Sound to establish a second machine. I will ask you, had the second machine been installed, what result would that have caused to your compensation?

A. Well, it should have at least tripled the compensation because the capacity of the second machine was estimated at virtually double that of the first. In other words, a 100" to 120" machine was contemplated, which would produce about twice as much tonnage, and inasmuch as the small machine was bearing all the burden of overhead for this large building as well as its own installation and

(Testimony of Joe A. O'Reilly.)

operation and supervisory crews, the second two-thirds of the volume would produce a greater profit than the first one-third. [169]

Q. Also, in those preliminary discussions in reference to the general plan to be followed, what was discussed in reference to your rate of commission?

A. I originally asked five percent sales commission because that was the amount that the pulp company was paying for their, oh, approximately \$20,000,000.00 a year of sales in pulp, or I would say, rather, a major portion of it.

Q. Were those commissions paid on the Pacific Coast or not?

Mr. Evans: I am going to object to this line of inquiry. I don't think it is material as to what——

Mr. Short: (Interposing) I will abandon that subject.

Mr. Evans: (Continued) ——what Puget Sound is paying some one else for some other job.

The Court: I understand counsel withdraws it and will pursue some other line of inquiry.

Mr. Short: Yes.

Q. (By Mr. Short): In reference to your testimony on cross examination in reference to the fact that certain customers had been developed by you, were there any customers of Puget Sound Pulp and Timber paperboard division or customers of its predecessor, Bellingham Paper Products Company, in [170] say 1950 and '51 who were not developed by you?

A. No, there were not. There were some—we

(Testimony of Joe A. O'Reilly.)

might say some drop-in sales came through association, but the percentage would be very small, like maybe three percent of the total.

Q. You also mentioned in your examination a term which I would appreciate your explaining. You referred to what you called an evergreen contract. What does that mean in the trade?

A. In the paperboard trade it means a contract which is self-renewing unless it is canceled by notice at some time previous to the date of expiration. In other words, the buyer has to anticipate his desire to cancel that by notice before the completion, and in case he doesn't, the contract remains in effect.

Q. Well, under those contracts does the customer order a certain minimum tonnage per period?

A. It is based on a minimum tonnage either by the month, by the quarter or by the year though he can buy more than that if his needs indicate it and the tonnage is available.

Q. No price is stated in those?

A. No price is stated.

Q. During any period that you were in the employ of Puget Sound Pulp and Timber Company and Bellingham Paper [171] Products Company, were you in the process of actively soliciting customers or what was the condition of the market as to whether the customers were soliciting the board mill or whether the board mill was soliciting the customers?

A. Well, the trend of business changed several times. There were some times when customers were

(Testimony of Joe A. O'Reilly.)

clamoring for board; there were some times when we had to seek and find the customers. I would say that my efforts were divided between servicing and soliciting customers.

Q. Do you recall your being asked by Mr. Evans whether or not during the period of September or October 1951 to February 1952 you brought in any orders from customers during that period to Puget Sound Pulp and Timber Company? Do you recall that question and answer?

A. Not exactly.

Q. Well, let me ask you. Prior to the period of October '51 to February of '52, inclusive, did you bring into the company orders for the sale of paper-board to Puget Sound Pulp and Timber Company?

A. The orders were practically all mailed direct.
* * * * * [172]

Q. (By Mr. Short): What mechanical procedure was followed in orders and in filling those orders?

A. Orders would develop as a result of personal calls and conversations by me, sometimes direct in person, sometimes by telephone. There were a small percentage of orders that I would actually bring back with me, which is what I referred to when I said yes, but the major orders would be developed as the customers' requirements also developed and would be mailed into the company at that time.

The Court: Well, would that last classification [173] of instances be an acquirement of yours per-

(Testimony of Joe A. O'Reilly.)

sonally or would it be something else? I do not understand what you mean.

Witness: Well, I was under the impression that the question was whether or not I physically brought back the orders personally to the company, and that I didn't do, only in a small percentage of cases.

The Court: All right. You may proceed.

Q. (By Mr. Short): Now, as I understand it, what you just described was the procedure prior to October 1951. What was the procedure subsequent to October '51 until February 29, 1952? Was there any change in that method?

A. There was no change in the method. The market at that time was in a case where demand was greater than supply, and my activities were in the nature of servicing the customers rather than soliciting orders.

Q. When you refer to servicing customers, to what do you have reference?

A. I mean answering their questions in regard to types and purposes of board, what can be accomplished by certain types of board, whether or not it could be treated for wet strength or grease-proofed.

Q. Did you say "grease-proofed"? [174]

A. Grease-proofed, yes, moisture proof, or bending qualities, or what we call a mullen test, which is the inherent strength of the board to rupturing, various and sundry things that have to do with

(Testimony of Joe A. O'Reilly.)

using board for a proposed purpose, which invariably the customers would ask me.

Q. Was there any other person at Puget Sound Pulp and Timber Company who had the background qualifications to answer that type of inquiry you have just described from their customers?

A. No, there wasn't though the laboratory had developed a lot of knowledge about physical characteristics of board. However, they didn't have the background of knowing what the various grades of board had been used for in times past and what could be expected of it in the future.

Q. Geographically, what area of the United States did your efforts concern themselves with?

A. In the final operation, the efforts were confined to the Pacific Coast, Southern California, Central California, Oregon and Washington. Previous to that, we had customers in the Middle West and on the East Coast, such as Philadelphia.

Q. That is paperboard customers?

A. That is right.

Q. Now, during the period of your employment prior [175] to October 1951, can you describe to the Court what proportion of your time did you physically spend in the plant at Bellingham and what proportion of your time did you spend elsewhere?

A. Well, I would say through the years that I would have spent——

The Court: Did you spend? That is the question. How much did you spend?

(Testimony of Joe A. O'Reilly.)

A. Did spend? One-third to one-half of my time in Bellingham.

Q. (By Mr. Short): And the remaining one-half or two-thirds would be spent where?

A. In other cities in Washington and Portland, Oregon, and Central and Southern California.

Q. Describe, if you will, what your activities consisted of while you were away from the plant of the Bellingham Paper Products Company?

A. I would call on the customers in various areas as well as prospects for paperboard from the mill. I would be in touch with the mill by telephone at intervals.

Q. Well, is there any particular area in which more customers are located than in another?

A. Well, I think finally it was divided about 50% between the Northwest, including Canada, or possibly 60% [176] as compared to 40% in Central and Southern California.

Q. Directing your attention now to the period of September and October 1951 until February 29, 1952, were your activities in reference to the Puget Sound Pulp and Timber Company accounts any different during that period than during the previous period you have just described?

A. The activities were no different than they were in previous times when board was in demand. During this time I had been in the Northwest several different times and called on, oh, I would say I called on Eagle Paper Box Company in Tacoma, the Northwestern Paper Box Company in Seattle,

(Testimony of Joe A. O'Reilly.)

the California Container Corporation in Portland, Oregon, as well as many accounts in the Bay Area and Los Angeles.

Q. During the period you have just described of September or October 1951 until February 29, 1952, what was the then state of the market as to supply and demand?

A. The customers were clamoring for more board than could be supplied.

Q. During the period of time just referred to, state whether or not the board mill during that period of time was operating at capacity?

A. The board mill was operating at full capacity through all of these times, and I think that February was probably one of the biggest months in volume that they [177] had.

Q. February of what year?

A. Of 1952.

Q. Was it necessary for you to then during that period of time actively sell the product of the paper-board division? A. No, it was not.

Q. Ordinarily when you would make these trips to Seattle, Tacoma, the Bay Area and Southern California, on any given trip how long would you ordinarily be gone? What was the normal length of time those trips away from the Bellingham plant would take?

A. Usually they would take two weeks or longer, a major portion of a week around the Bay Area and about the same time down South, and possibly two

(Testimony of Joe A. O'Reilly.)

or three days in Portland, and two or three days in the Seattle and Tacoma area.

Q. Was there ever any occasion during the period preceding October 1951 in which an incident occurred as you just recently described of coming North to the Seattle-Portland-Tacoma area and then returning South again without coming to Bellingham?

A. Yes, there were several occasions. It would depend on circumstances at the time.

The Court: State for my convenience, [178] even though you may have, from your standpoint, sufficiently discussed it already, what, if any, change occurred in the nature and extent of your services to the defendants after the change of the percentage rate of compensation from three to one and one-half percent.

Witness: No change whatever.

The Court: Well, the same question with reference to the defendants' acts and conduct.

Witness: There was no change.

The Court: Do you recall the defendants doing anything different after that time when you announced your willingness to receive one and one-half percent of the profit or whatever it was, one and one-half percent of whatever it was you were to get, instead of three percent?

Witness: As a matter of accounting, they changed the method of charging pulp to the board mill, which made no difference to me personally profit-wise or to the stockholders of the company.

(Testimony of Joe A. O'Reilly.)

In other words, it was of no value to any one; it was just an accounting procedure.

The Court: Was it of any value to the stockholders?

Witness: No value. [179]

The Court: Or other officers or employees of the defendant company?

Witness: No value to any one. It was just a different method of accounting.

The Court: Did it have any effect whatsoever on building up any greater reserve or any stock in trade or the increasing of the capital plant establishment or anything of that sort?

Witness: None whatever. * * * * *

Q. You were asked on your cross examination in reference to a man named Mr. Emmons. Will you identify him, please, this gentleman from California?

A. He is the manager of the Salinas Valley Wax Paper Company in Salinas Valley, California.

Q. I am confused about this. Is he the man to whom reference was made as having advanced some money to you for your use in establishing the mill in Richmond? Is that the same person?

A. That is the same person.

Q. How long had you known Mr. Emmons at that time?

A. He had been a personal friend of mine for in excess of ten years I would say. * * * * * [180]

Q. (By Mr. Short): Mr. O'Reilly, does that

(Testimony of Joe A. O'Reilly.)

Exhibit A-6 which I have just read fully state your views and contentions? A. Yes, it does.

The Court: Had you discussed the matter with counsel before writing that letter?

Witness: No.

The Court: That was just something you decided to write without advice from counsel or anyone else?

Witness: That is correct.

The Court: Since on or about the time you began receiving the one and one-half percent [181] instead of the former three percent, did you or have you discussed the matter of your rights under your contract with respect to this business with any member of the Bar?

Witness: No, I did not. As a matter of fact, I brought the letter personally to Bellingham and expected to talk to Mr. Turcotte about it, about the various things that were put forth there. He was absent from the city at the time so I left it in the office for him.

The Court: You may inquire.

Mr. Short: That is all, Your Honor.

The Court: Any recross?

Recross Examination

Q. (By Mr. Evans): Mr. O'Reilly, you understand that the Court meant when he asked you if you had discussed this matter with counsel prior to writing your letter of June 5, 1953—do you understand what that meant?

(Testimony of Joe A. O'Reilly.)

A. I very definitely do.

Q. Just to make sure——

A. I very definitely do. I discussed it with no attorney of any kind previous to bringing that letter. [182] In fact, it was after receiving Mr. Turcotte's reply in which he did not deign to discuss the matter personally, several months after that I took it up with attorneys.

Q. Now, you were given a rather free hand with the operation of the board mill, were you not?

A. Yes, I was.

Q. As a matter of fact, when you came in there you were the only expert on how to manufacture paperboard, were you not?

A. Well, I wouldn't classify myself as an expert, but I was cognizant of the methods and usual products.

Q. Well, anything that was done there was done under your direction, isn't that correct, so far as operation is concerned, what they made and how they made it? A. That is correct.

Q. And no one told you how to do your job, did they?

A. Not directly. We discussed the position from time to time. I talked to Mr. Roberg mostly, occasionally both Mr. Roberg and Mr. Turcotte.

Q. The decisions that were made, particularly as to the technical side of the matter, as to what should be made and how it should be made, were your decisions, were they not? A. Yes. [183]

Q. In other words, they didn't try to interfere

(Testimony of Joe A. O'Reilly.)

and tell you to do something different from that which you thought was the right thing to do, did they?

A. There were a few suggestions from time to time but they didn't give me any definite directives.

Q. So now in this letter of June 5, when you speak of certain things that caused casualties, I believe you called them, as to sales, those were in reality results of your decisions and your activities.

A. Not at all. They were the results of business conditions in general and outside competition.

Q. Well, now, does that account for the dirt count in the paper? A. No.

Q. In other words, these physical things that caused you to lose orders or quit making different kinds of paperboard were as a result of your own efforts in managing the paperboard division, isn't that correct? A. No.

Q. Well, then, what was the cause of the extra dirt count, et cetera?

A. The dirt count was in the pulp which is our raw material, and which we could not avoid carrying through to our finished product. When pulp is in great demand, screenings are done in a more efficient manner, which means [184] that all of the fibers possible are removed from the knots and chivs and imperfections in the board, with the result that a certain amount of dirt goes through into the pulp, making it lower grade.

By the same token, it removes all of the fibers

(Testimony of Joe A. O'Reilly.)

virtually from the screenings, and they also are lower grade.

When we were in competition on tag board, the most outstanding producer of tag board in the country was Springhill, Louisiana, and they had a perfectly cream-colored sheet of tag board that was really beautiful to look at, but it wasn't available, so we offered our tag board though we had a dirt count in it to the customers in need of it. However, when Springhill tag and other qualities like that became available, we weren't able to sell our tag board.

Q. But it was no fault of the Puget Sound Pulp mill?

A. It was the result of their efforts to produce greater earnings in the pulp mill, yes. It wasn't a definite action towards me.

Q. Now, just let me finish my question.

It was through nothing they did on their part that caused you to lose these customers, was it?

A. No. [185]

Q. Now, I understand a great deal of your testimony this morning with regards to the work that you did for Puget Sound Pulp and Timber Company after you left some time in September up until the time that your checks stopped, as of the last day of February, '52, how would Puget Sound Company know whether you were doing any work or not?

* * * * *

A. The executive officers of the company would

(Testimony of Joe A. O'Reilly.)

have no way of knowing. There would be certain contacts with the board mill but inquiries were never made in that connection at any time.

Q. So then Puget Sound would have no way of knowing whether you had done any work whatever or had spent all your time, is that right?

A. Not without exploring it specifically, there would be no way that it would come to their attention, no more during this period than any time previously. [186]

Q. Well, prior to this period of time you had an office there; you were around every now and then; you had conversations with Mr. Turcotte and Mr. Roberg about how things were going on, didn't you?

A. That is right.

Q. But after some time in September '51 you never saw them again, did you?

A. Either of the two gentlemen mentioned?

Q. Yes. A. I don't believe so.

Q. And they are the officers or the managers who run the company, isn't that right?

A. That is right.

Q. Now, during this period of time you were also pushing your products, selling the products of your new paperboard company in California, were you not? [187]

* * * * *

A. The paperboard mill was running at full capacity all this time and——

Mr. Short: What paperboard mill?

Witness: The paperboard mill in Bellingham

(Testimony of Joe A. O'Reilly.)

was running at full capacity and customers were asking for more tonnage. I talked to them about this additional tonnage being supplied from down below in certain cases where the area was more desirable for that production and less desirable for the mill up here.

Q. (By Mr. Evans): But you were during this period of time procuring customers and taking orders for this new California company, were you not? A. Yes.

Q. And you wanted that mill to be in full capacity, too, did you not?

A. I had already suggested to Mr. Turcotte that I felt capable of keeping them both going to full capacity.

Q. Well, will you kindly answer my question, please?

Mr. Evans: Will the reporter read it, please?

(Whereupon the question is read by the court reporter as follows: "And you wanted that mill to be in full capacity, too, did you not?") [188]

A. Yes.

Q. Now, I believe you also advised us on redirect examination here this morning that there was no problem to sell the products of paperboard mills; that customers were just clamoring for the products during this period of time, is that correct?

A. That is correct.

Q. So, as a practical matter, there were no services of a salesman needed, is that what you are trying to tell us?

(Testimony of Joe A. O'Reilly.)

A. The service to a customer and user of paperboard is always a requirement regardless, because of the characteristics and natures of the products and capabilities of certain mills and equipment to produce them. That never diminishes.

Q. Now, during this period of time, September through February, 1952, you spent the major portion of your time, as I understand it, in California, is that correct? A. That is correct.

Q. On how many occasions, if any, did you actually make a trip up to the State of Washington?

* * * * *

A. I made at least six or eight trips during that period to the State of Washington.

Q. (By Mr. Evans): That is during that six months period?

A. That is right. Well, let's see, that is a five month period, isn't it?

* * * * *

Q. Now, most of the customers of Puget Sound Pulp and Timber Company are in Washington, Oregon and Canada, isn't that correct?

A. Numerically or volume-wise? [190]

Q. Well, any way you want to put it.

A. In the planning for this arrangement, I planned to have practically all of them in Oregon, Washington and Canada.

Q. That was so they couldn't compete with your California company, isn't that correct?

A. So the paperboard division would realize a

(Testimony of Joe A. O'Reilly.)

greater profit because of lack of freight expenses in shipping to greater distances.

Q. You arranged it that way?

A. That is right.

Q. But that is where most of their customers were?

A. Not "were." That is where they may be now, but not were.

Q. Well, if you had arranged it that way—you left them at about that time—then the fact that they may be there now was not due to anything that you did, was it?

Mr. Short: I don't quite understand the question.

The Court: Read the question.

(Whereupon the last question is read by the court reporter.)

A. Yes, it was. The reason I say that is for instance in the case of Gypsum, Lime & Alabastine Company they were asking for 450 tons a month, which is about 40% [191] of the capacity of the board mill here and at that time we could only give them about 250 tons a month. The customers were asking for more board in every area, but in going along with their demands and planning to place the board where it would be more profitable for the paperboard mill here is why it resulted in that way.

I would say even today that it is probably divided 60-40 as far as numerical customers are concerned between the other states and Washington and Canada.

(Testimony of Joe A. O'Reilly.)

Q. Now, do I understand you correctly that you did not carry an order book around with you and actually procure a signature of a customer on orders?

A. That is correct. In fact, we didn't have an order book.

Q. You didn't even have an order book?

A. There is none in the Puget Sound Company today.

Q. Well, then, it was up to the customer to write a letter or send a purchase order, whatever he wanted to the company, by mail to obtain his products that he might want, is that right?

A. That is right.

Q. And this servicing of customers, as you call it, that doesn't include taking any orders then as I understand it. It is just going around and being somewhat of a good will ambassador answering any questions they might have? [192]

A. I would say more than their technical questions. It is the matter of promoting the good will of a customer toward the company, naturally.

Q. Well, you take them to lunch and are nice to them; you pass the time of day with them; you answer any technical questions they want answered; just build good will, is that right?

A. That is right.

Q. So that is what you contend your job was during the period from September of '51 through February of '52?

A. In that regard it continued as before, yes.

(Testimony of Joe A. O'Reilly.)

Q. Now, you didn't submit any expense accounts during that period of time, did you?

A. No, I didn't.

* * * * * [193]

THOMAS GUY EMMONS

called as a witness on behalf of the plaintiff, being first duly sworn by the Notary, testified as follows:

Mr. Short: (Reading)

"By Mr. Bernbaum:

"Q. Mr. Emmons, please state your full name.

"A. Thomas Guy Emmons.

"Q. You are associated with the Salinas Valley Wax Paper Company? "A. Yes, sir.

"Q. In what capacity? "A. Part owner.

"Q. And in your capacity as part owner, you handle the purchases for the company, for its supplies?

"A. Most of the time. Mr. Nelson subbed for me in a lot of instances when I was away.

"Q. But primarily you were in charge of purchases is that correct?

"A. That is right.

"Q. And the supplies used by your company?

"A. That is right.

"Q. Now, directing your attention to the Puget Sound Pulp and Timber Company, you did business with that company? "A. Yes.

"Q. Your company did business with that company? "A. Yes, sir.

(Deposition of Thomas Guy Emmons.)

“Q. And tell us approximately when your company started to do business with that company.

“A. I have got a very poor memory on dates, but it was prior to 1948 when we bought our first materials from the Puget Sound. [197]

“Q. At that time did they have a paper board division? “A. No, they didn't.

“Q. What type of materials did you buy from them at that time?

“A. Bought just straight unbleached sulphite pulp in large sheet bales, which we shipped down here and subdivided into smaller size sheets to fit the lettuce crates.

* * * * * [198]

“Q. And in what capacity did you meet Mr. O'Reilly?

“A. Well, I was in Bellingham seeking for supplies, and Mr. O'Reilly, as I understood it, was the manager and part owner of the Bellingham Paper Products Company.

“Q. I see. And at that time did you make arrangements with him concerning the type of product that your company would purchase from the Paper Board Division or from—after the mill was going to be put into operation?

“A. Yes, sir.

“Q. And will you please describe briefly what that was going to be.

“A. Well, Mr. Roberg whom I had formerly been doing business with in regard to these orders told me, 'You can do business with Joe from now

(Deposition of Thomas Guy Emmons.)

on.' And I went into Joe's office and explained to him just what we needed, and it was an absorbent sheet with characteristics of a blotter, to be cut to sizes to fit the lettuce crate. And also we asked that they incorporate into the making of that sheet the introduction of synthetic resins to give it more strength [199] when wet, which they were unable to do for us when we were buying from the pulp mill direct. The construction of that sheet was something that Mr. O'Reilly worked out in the board mill, and it proved very successful.

"Q. Did you continue to buy that sheet, and that product, from the Puget Sound Pulp and Timber Company after the mill was put into operation, is that right?

"A. Well, the first shipments were purchased from the Bellingham Paper Products Company.

"Q. And then subsequently——

"A. (Interrupting) Subsequently the Puget Sound Pulp and Timber Company, at the time when the two concerns made the change, I don't know just when that happened.

"Q. Then, you continued to do business with Mr. O'Reilly on behalf of your firm and Puget Sound Pulp and Timber Company, did you not, during the years 1949, '50, '51 and part of '52?

"A. That is right.

"Q. That is correct. Now, directing your attention to September 1, 1951, to March 1, 1952, did you have any contact with Mr. O'Reilly concerning the products that were being purchased by your

(Deposition of Thomas Guy Emmons.)

company from Puget Sound Pulp and Timber Company?

"A. Yes, a number of times.

"Q. Tell us how, in what manner, you had those contacts with Mr. O'Reilly during that period. [200]

"A. Well, as Mr. Nelson explained to you, we were desperate for getting some supplies during that last quarter of 1951, and Mr. O'Reilly was not always at the Puget Sound office. So I contacted him personally by telephone, and in person at the mill he was constructing in Richmond.

"Q. You also contacted him at home on some occasions?

"A. I was at his home, but I don't remember transacting any business there.

"Q. But you did discuss the matter of purchases of the paper that you had purchased from Puget?

"A. That is right.

"Q. When you had these conferences with him?

"A. Yes, sir.

"Q. Now, will you tell us, please, what the primary purpose of your contacts were with him during your contact during the period September 1, 1951, and ending about March 1, 1952.

"A. We were interested in securing a greater and more secure source of supply for obtaining this pulp pad, and for that reason we were very much interested in seeing Mr. O'Reilly complete his mill in Richmond as a second source of supply for purchasing our lettuce pads.

(Deposition of Thomas Guy Emmons.)

“Q. What was your primary source of supply at that time?

“A. Puget Sound. [201]

“Q. And your contacts were with him during this period. Did any of those contacts relate to your purchases and your shipments that you were receiving from Puget Sound Pulp and Timber Company?

“A. Yes, I am quite sure they were.

“Q. Are you positive of that?

“A. Yes.

“Q. Now, did you at any time learn that Mr. O'Reilly was going to separate from the Puget Sound Pulp and Timber Company, paper board division?

“A. I learned that in the first quarter of '52. I don't remember what the date was.

“Q. You learned that during the first quarter of 1952?

“A. Yes.

“Q. And do you recall from whom you learned that?

“A. Mr. O'Reilly himself.

“Q. Did you—when did you first find out directly from any representative of the Puget Sound Pulp and Timber Company that Mr. O'Reilly was separating from that company?

“A. I can't recall the dates of that.

“Q. Just approximately?

“A. It was during that first quarter of '52.

“Q. During the first quarter of '52. And would you say that prior to the time that you—withdraw that. I will restate the question. When did you

(Deposition of Thomas Guy Emmons.)

first observe any [202] change in the processing of your orders by Puget Sound Pulp and Timber Company?

“A. Well, it is hard to recall the change there.

“Q. To the best of your recollection.

“A. I believe it was in the first quarter of '52.

“Q. And what change did you observe, if any?

“A. Well, most of the change we observed was that we were telephoning to Mr. Critzer, the mill superintendent, the paper board mill superintendent, and Mr. De Lopez, and very often in regard to getting out shipments. And it was a tendency at that time to—I don't know whether it was an effort on the part of the board mill to save money on the product, but we had trouble with the product that they were turning out and had to call Mr. Critzer and complain a number of occasions during the time that they were taking the thing over from Mr. O'Reilly.

“Q. That was during the early quarter of 1952?

“A. Yes.

“Q. The first quarter. Now, let me ask you this question, Mr. Emmons. Directing your attention again to the period commencing with September 1, 1951, and ending about March 1, 1952—during that period did you, or did you not, receive any telephone calls from Mr. O'Reilly at your plant here in Salinas with regard to purchases and shipments that you had made, or that were being processed between [203] your firm and Puget Sound Pulp and Timber Company?

(Deposition of Thomas Guy Emmons.)

"A. I am pretty sure we did.

"Q. And do you recall whether or not, and isn't it a fact that Mr. O'Reilly made some of those telephone calls from Richmond, California?

"A. Yes.

"Q. And those calls, would you say to the best of your recollection at this time, pertained primarily to the purchases that were being processed and the supplies that you were buying from Puget Sound Pulp and Timber Company?

"A. Well, we talked about a good many subjects, but that was one of the subjects.

"Q. That was the thing that he talked to you about? "A. Yes.

"Q. Now, isn't it a fact, Mr. Emmons, that during the year 1950 and during the early part—during 1951, Mr. De Lopez, to your knowledge, acted as traffic manager for Puget Sound Pulp and Timber Company? "A. I believe so.

"Q. And you had conversations with him during the period that I have just mentioned with regard to your shipments?

"A. No, no, I never did talk to Mr. De Lopez.

"Q. Whom other than Mr. O'Reilly did you speak to [204] during that period?

"A. Either Mr. O'Reilly or Mr. Roberg.

"Q. Mr. Roberg. And did you continue to talk to Mr. Roberg with regard to your purchases after Mr. O'Reilly left Puget Sound Pulp and Timber Company?

(Deposition of Thomas Guy Emmons.)

"A. I believe I did talk to Mr. Roberg on one occasion—during the first quarter of 1952.

"Q. Do you recall whether on that occasion Mr. Roberg mentioned anything about Mr. O'Reilly's separation from the Puget Sound Pulp and Timber Company? "A. I believe he did.

"Q. And that was—would you say that was the first time to your recollection that he had mentioned that?

"A. First time he had mentioned it, yes.

"Q. And that was in——

"A. (Interrupting) That was some time in the first quarter of 1952.

"Q. Now, subsequent to March 1, 1952, you continued to do business with the Puget Sound Pulp and Timber Company, paper board division, did you not? "A. Yes, sir.

"Q. As a matter of fact, you are still doing business with that company?

"A. That is right.

"Q. Is it a fact that you are still buying the same [205] type of product you previously purchased when Mr. O'Reilly was associated with the Puget Sound Pulp and Timber Company?

"A. Yes, that is right.

"Q. Would you say there has never been any diminishment in the quantities?

"A. Oh, yes, there has been a decided diminishing of quantities; due to the difference in our methods of packing lettuce, the demand for that type of product has decreased.

(Deposition of Thomas Guy Emmons.)

"Q. About when did that decrease start?

"A. Well, it started pretty heavily in 1953.

"Q. But not prior to that, is that correct?

"A. No.

"Q. So that you could say, then, for the period commencing with March 1st, 1952, and at least until March 1, 1953, the general amount, or the quantities of supplies and the type of supplies that you purchased from Puget Sound Pulp and Timber Company remained constant?

"A. Fairly so, yes. [206]

* * * * *

Cross Examination

Mr. Short: (Reading.)

"By Mr. Lane:

"Q. Mr. Emmons, I think you testified that during the last half of 1951 you had several conversations with Mr. O'Reilly regarding the products you were purchasing from the Puget Sound Pulp and Timber Company? "A. Yes, sir.

"Q. Did you have any letters or correspondence with him during that time?

"A. No. We have searched our files here for letters and records of that kind, and there doesn't seem to be any.

"Q. Now, I think you testified that he was not always at the office of the Puget Sound Pulp and Timber Company at Bellingham; that you sometimes contacted him at Richmond, is that right?

"A. That is right.

"Q. Do you recall ever having any conversation

(Deposition of Thomas Guy Emmons.)

with him at Bellingham after September 1st, 1951?

"A. No, I can't pin it down to any specific date. I think most of the contacts I had with him after, if not all of them, were probably at Richmond.

"Q. At Richmond. You don't recall any time that you talked to him at Bellingham after that date?

"A. No, I don't remember calling him. [207]

"Q. When did you first learn that Mr. O'Reilly was starting a new company called the California Paper Mill Company?

"A. I don't remember just exactly as to dates. But I believe it was early in the year 1951.

"Q. I see. And when did you start ordering from that company?

"A. I don't remember the exact dates.

"Q. But your company did start ordering?

"A. We did start ordering some board from them, yes. I remember that the products we bought from the Puget Sound, from the paper board mill at Puget Sound, there were two products. One was this pulp lettuce pad and the other was the calendar paper board. That was used for printing and waxing.

"Q. That was what you were purchasing from the pulp company?

"A. Yes.

"Q. And you purchased the board from the California Paper Board Company, a similar product?

"A. Yes, that's right.

"Q. I believe you testified, that you first testified

(Deposition of Thomas Guy Emmons.)

that Mr. O'Reilly, in 1952, that he had left the pulp company, is that right?

"A. I believe that is right. [208]

"Q. During that period of time, and prior to that time, do you recall whether you had purchased any board from the California Paper Board Company?

"A. I didn't understand the question.

"Q. Prior to that time had you purchased board from the California Paper Board Company, to the best of your recollection?

"Mr. Bernbaum: What time are you talking about?

"Mr. Lane: That is 1952.

"Q. When you first learned from Mr. O'Reilly that he had left the pulp company?

"A. No, sir, his mill wasn't ready to turn out any products prior.

"Q. I see. So that prior to the time you learned from Mr. O'Reilly that he had left the pulp company, you had not purchased anything from the paper board company, the California Paper Board Company?

"A. That is right.

"Q. And then in 195—the year 1952, did you continue to purchase from the pulp company, as I understand your testimony?

"A. During the balance of 1952?

"Q. Yes. "A. Yes. [209]

"Q. And as I understand, approximately the same quantities as you had previously purchased from them?

"A. Yes.

(Deposition of Thomas Guy Emmons.)

“Q. I see.

“Q. Those quantities being all they would let us have.

“Q. And that is, you say, why you purchased from the California Paper Board Company as a secondary source of supply?

“A. That is right.

“Q. Do you keep track of your telephone calls with Mr. O'Reilly from Richmond?

“A. No.

“Q. You were in Mr. O'Reilly's home in Richmond, were you?

“A. I was there once, yes.

“Q. At that time no business was discussed, I believe you said?

“A. I don't believe there was. There was some other business that I had with Mr. O'Reilly, separate and apart from our orders of materials that I probably went to his home to discuss.

“Q. Yes. Was your company financially interested in the California Paper Board Company?

“A. Yes. [210]

“Q. And I believe you stated that you first learned of the formation of the California Paper Board Company in the early part of 1951, is that right?

“A. I believe that is right, I can't recall the date exactly.

“Mr. Lane: I believe that is all.”

(Deposition of Thomas Guy Emmons.)

Redirect Examination

Mr. Short: (Reading.)

“By Mr. Bernbaum:

“Q. Mr. Emmons, isn't it a fact that you solicited Mr. O'Reilly in connection with a secondary source of supply, in addition to the supplies you were getting from Puget, in order to increase the source of supply of those materials which your company so badly needed? Isn't that correct?

“A. That is materially right, yes.

“Q. And this is particularly true in 1951?

“A. I think that is when it happened, yes.

“Q. It wasn't a case of where Mr. O'Reilly attempted to divert any business from Puget Sound Pulp and Timber Company?

“A. Absolutely not. We put \$40,000.00 into Joe's mill in order to get more supplies, and it was our effort, [211] not his, that made that business contact possible.

“Q. If you could have gotten more supplies of the kind you needed, as you got from Puget Sound Pulp and Timber Company, you would have been glad to buy that, would you not?

“A. Absolutely yes.

“Q. From Puget Sound Pulp and Timber?

“A. Yes. In fact, after we made an investment in Mr. O'Reilly's new mill at Richmond, he proposed to us that we divert more tonnage to his mill, and we stated at that time we did not want to jeopardize our position with the Puget Sound Pulp

(Deposition of Thomas Guy Emmons.)

and Timber Company on supplies. So we did not cut loose from them.

“Q. And you have continued to do business with them ever since? “A. That is right.

“Q. And you use them as your primary source of supply ever since, is that correct?

“A. That is right, yes.

“Q. In other words, the fact that you made an investment in this California Paper Board at the time you mentioned had absolutely nothing to do with the control of your source of supply or any change in the relationship between your firm and the Puget Sound Pulp and Timber Company, paper board division? [212]

“A. That is right.

“Mr. Bernbaum: That is all.”

Recross Examination

Mr. Short: (Reading.)

“By Mr. Lane:

“Q. Mr. Emmons, when did Mr. O'Reilly suggest to you the statement that you just made?

“Mr. Bernbaum: What was that?

“Q. When did Mr. O'Reilly suggest to you that you purchase more products from the California Paper Board Company?

“A. Well, it was during the time he was perfecting the operation of his new mill.

“Q. Can you fix it by a date, approximately?

“A. No, I can't pin down the exact date. It was

(Deposition of Thomas Guy Emmons.)

some time in 1952. Whether it was before March or after I couldn't say.

"Q. Might it be in 1951?

"A. No, it wasn't in 1951. Neither Mr. O'Reilly nor ourselves knew whether he could turn out a satisfactory product at that mill.

"Q. So it was after his mill opened up, was it?

"A. Yes.

"Mr. Bernbaum: I believe you stated it was in 1952? [213]

"The Witness: Yes.

"By Mr. Lane:

"Q. His mill opened up when, do you recall?

"A. It was early in 1952. I don't remember the date.

"Q. It wasn't in 1951, to your recollection?

"A. No."

* * * * *

The Court: This deposition of the witness Emmons is read and received in the record of this trial as a part of the plaintiff's case in chief with like effect as if that witness were personally present and had been sworn and orally testified from the witness stand. [214]

* * * * *

JOHN H. FRANKL

called as a witness on behalf of the plaintiff, being first duly sworn by the Notary, testified as follows:

(Deposition of John H. Frankl.)

Mr. Short: (Reading.)

“Direct Examination

“By Mr. Bernbaum:

“Q. Mr. Frankl, will you please state your full name and your occupation?

“A. Occupation now or when?

“Q. Your occupation as of now.

“A. Partner with Laminated Paper Products Company. * * * * * [215]

“Q. Since you have been with Laminated Paper Products Company, and at least during the last five years, you have been in charge of purchases of supplies, including paper board such as used by your company, have you not? “A. Correct.

“Q. Please describe briefly what type of paper board your company uses and has used during the past five years that it purchased from Puget Sound Pulp & Timber Company or any other company.

“A. Up to this date?

“Q. Well, five years.

“A. Five years?

“Q. Commencing with 1950.

“A. The majority of it consisted of so-called double Manila lined news. Do you know how to spell it?”

Mr. Short: May I interrupt?

The Court: Wait just a minute. Off the record——

(Whereupon an off-the-record discussion was had.)

The Court: On the record, it is stipulated by and

(Deposition of John H. Frankl.)

between counsel that the business referred to by this witness so far by the name Laminated [216] Paper Products Company is a San Francisco business. You may now proceed.

Mr. Short: (Reading.)

“Q. L-a-n-d.

“A. Here is, for instance, an order for three hundred tons from Puget Sound, double Manila lined news.

“Q. Do you know Mr. Joseph O'Reilly?

“A. Yes, I do.

“Q. How long have you known him?

“A. To the best of my recollection, from 1947 on.

“Q. To this day? “A. Yes.

“Q. In what capacity did you know him in relation to Puget Sound Pulp and Timber Company?

“A. As a man that sold board from this particular mill to us and solicited business, sell board which we bought.

“Q. Did you know him in his capacity as an officer and sales representative of Bellingham Paper Products Company, prior to the time that he took over the Paper Board Division of Puget Sound pulp and Timber Company? “A. No.

“Q. You knew that he set up the mill, did you not, in Bellingham for Puget?

“A. Yes, I did. I mean, I knew the name of Joe [217] O'Reilly but I didn't know him personally.

(Deposition of John H. Frankl.)

“Q. Did you know in what capacity he was connected with the——

“A. Puget Sound, yes.

“Q. Will you please describe that briefly?

“A. To which period do you refer now?

“Q. From the beginning.

“A. Well, at the beginning I heard the name of Joe O'Reilly, didn't mean much to me, because at that time I was superintendent, and as such it is to buy or not to buy from him. But I knew his name and I knew the person of Joe O'Reilly, he was associated with Bellingham and did something which wasn't interesting to me.

“Q. Approximately when did you start doing business with him?

“A. Let me see now. With Joe O'Reilly?

“Q. In his capacity with Puget Sound Pulp and Timber Company.

“A. Well, the easiest thing to answer—I wouldn't know exactly.

“Q. Approximately.

“A. The first order we placed, which we could pick out?

“Q. We don't want to go into all that.

“A. I am not—let me see. It would be around '47, '48, I imagine. Yes. [218]

“Q. All right. That is good enough.

“In your capacity as part owner and also superintendent of Laminated Paper Products Company, you had occasion to handle the purchases of these products that you have described, did you not?

(Deposition of John H. Frankl.)

"A. Exclusively. Nobody else handled it but me.

"Q. Describe briefly your method of purchases from Puget Sound Pulp and Timber Company for the period commencing in 1950.

"A. Yes. Well, it was either by telephone, by calling up Joe O'Reilly in Bellingham, Washington, or Joe O'Reilly would drop in to solicit business.

"But you have to remember there was always at that particular time such a terrific shortage that most of the time we simply called him up and placed our written orders, just like I showed you now. That was the way to handle it.

"Q. So your method generally of doing business with Puget Sound was through telephone contact either directly with the plant or with Joe O'Reilly?

"A. Personally, and that was confirmed by a purchase order from us always; sometimes in a blanket order.

"Q. We are talking about the period commencing 1950 up to date. "A. Yes. [219]

"Q. Your company still does business with Puget Sound Pulp and Timber Company?

"A. The majority, ninety percent of it.

"Q. During the period commencing with 1950 and 1951 and 1952, for those three years, was there a short supply of the type of materials your company—— "A. Terrific shortage.

"Q. There was? "A. Terrific shortage.

"Q. Did you make purchases from other concerns other than Puget Sound Pulp and Timber Company? "A. Yes.

(Deposition of John H. Frankl.)

“Q. Did you do this continuously during the period I have mentioned?

“A. That’s correct. But always remember the majority—when I say ‘the majority,’ as a rough guess I would say ninety percent was still received through Puget Sound, mostly through the influence of Joe O’Reilly.

“I mean he just provided us with enough board so we could stay alive.

“Q. There was always a short supply and you had difficulty getting your supplies?

“A. Terrific.

“Q. During the period we have just mentioned?

“A. Yes. [220]

“Q. Directing your attention to the period of 1951, the entire year of 1951, and the first quarter of 1952, did you make purchases of paper board such as you have described from Puget Sound Pulp and Timber Company?

“A. Continuously, up to this date.

“Q. During that period of time, in addition to making contact with Mr. O’Reilly—

“A. Repeat that. How was that?

“Q. During the period of time I have just mentioned—

“A. Fifty-one?

“Q. Fifty-one and fifty-two. During that period of time did you have contact with persons other than Mr. O’Reilly that were associated with Puget Sound Pulp and Timber Company?

“A. Yes. Russell De Lopez. But not as a salesman but rather connected with traffic. Russell De

(Deposition of John H. Frankl.)

Lopez sold later on after the years you just mentioned. But at the time you specified, Russell De Lopez arranged the traffic, to the best of my knowledge. That was my contact with him and that was the only person I knew beside Joe O'Reilly.

"Q. Did you have contact with Mr. Russell De Lopez during the early part of 1951 as well?

"A. That's right.

"Q. And 1950? "A. That's right. [221]

"Q. Was there anyone else other than Mr. Russell De Lopez at Puget with whom you had contact concerning your orders? "A. No.

"Q. During the period commencing with September 1, 1951, through February of 1952, or through March 1st, 1952, did you make purchases of paper board, such as you have described, from Puget Sound Pulp and Timber Company? Should I repeat that question? "A. Yes, please.

"Q. During the period commencing with September 1st, 1951, through February of 1952—

"A. Oh, yes.

"Q. —or through March 1st, 1952, did you make purchases of paper board, such as you have described, from Puget Sound Pulp and Timber Company?

"A. I am sure we got board at that time.

"Q. Did you make purchases then?

"A. It might have been covered by a previous blanket order. It could be covered easily.

"Q. We will hand you that in a minute.

(Deposition of John H. Frankl.)

"A. I am almost sure we did. I am almost sure we did.

"Q. Your answer would be yes, then?

"A. Yes. It might have been covered by a previous blanket order. [222]

"Q. You did receive deliveries during this period? "A. That's right.

"Q. As you stated, some of these deliveries, commencing with September 1, 1951, of purchases were based on purchase orders or letters entered into between your company and Joseph O'Reilly on behalf of Puget Sound Pulp and Timber Company, prior to September 1, 1951, is that correct?

"A. Yes.

"Q. Now, Mr. Frankl, I will hand you a statement covering the purchases made by your company from Puget Sound Pulp and Timber Company for the year 1951 and for the year 1952, and ask you to look at that. "A. Yes.

"Q. And ask you, to the best of your knowledge, whether that is a true and correct statement covering your purchases that were taken from your records.

"A. If it is taken from the records, it is correct. I mean, I haven't picked it out."

The Court: Wait just a moment. Do you intend to use that evidence to identify any document that has not already been identified?

Mr. Short: I think that the exhibit should be admitted.

The Court: Let plaintiff's counsel look at the

(Deposition of John H. Frankl.)

original ribbon number of the deposition which has been [223] filed and published in this Court and in this case. If opposing counsel wants to see what counsel is now looking at, he may approach plaintiff's counsel's table.

(Whereupon Messrs. Evans and Short examine the original ribbon copy of this deposition.)

Mr. Evans: We have photostatic copies of it, Your Honor. We have no objection to it.

The Court: Do you wish it to be marked as an exhibit in this case?

Mr. Short: Yes.

The Court: Let the Clerk remove it then and mark it.

Clerk: It will be marked Plaintiff's Exhibit No. 12.

(Record of Purchases marked Plaintiff's Exhibit 12 for identification.)

The Court: What was marked by Benard on January 12, 1955, in connection with the deposition of the witness Frankl has been marked by the Clerk at the Court's direction as Plaintiff's Exhibit 12.

You now offer that exhibit?

Mr. Short: I now offer Plaintiff's Exhibit 12 for identification. [224]

The Court: Any objection?

Mr. Evans: No objection.

The Court: Admitted.

(Plaintiff's Exhibit 12 received in evidence.)

(Deposition of John H. Frankl.)

The Court: You may proceed to read the deposition.

Mr. Short: I am at line 11, page 11. (Reading.)

"Q. This was taken from your records by your secretary.

"A. Provided it is in the records, then these figures are correct.

"Q. It is taken from your records.

"A. Unless my secretary made a mistake.

"Q. From your books.

"A. Unless she made a mistake in copying. I couldn't swear to these figures.

"Mr. Bernbaum: Off the record for a moment.

"By Mr. Bernbaum:

"Q. The books and the records with reference to your purchases made by your company from Puget Sound Pulp and Timber Company are under your supervision and direction and within your knowledge, is that correct? "A. Sure.

"Q. This statement represents the totals of your purchases [225] for the year 1951 and 1952, is that correct? "A. That is correct.

"Mr. Bernbaum: May that go into the record? May it be stipulated that go into the record?

"Mr. Lane: I will stipulate that he testifies that is what his books show.

"Mr. Bernbaum: There won't be any objection as to foundation?

"Mr. Lane: Not unless I find it is inaccurate, the method of proving it. I have no objection.

"Mr. Bernbaum: May it be stipulated that this

(Deposition of John H. Frankl.)

is a true and correct copy taken from their records?

“Mr. Lane: If that is what Mr. Frankl says.

“Mr. Bernbaum: So stipulated? All right, it will go in.

“Let that be marked Plaintiff’s Exhibit 1 of this particular witness’s deposition.

“(Thereupon the foregoing document, on the letterhead of Laminated Paper Products Company, dated January 12, 1955, was introduced and marked Plaintiff’s Exhibit 1.)”

The Court: Proceed, please. This exhibit that you are now talking about in the deposition has already been admitted. Proceed.

Mr. Short: On line 20, Mr. Bernbaum. [226]

Mr. Bernbaum: (Reading.)

“The Witness: Of course, these figures must synchronize with the accounts receivable.

“Mr. Bernbaum: She took them right off the book.

“The Witness: From the Puget Sound Pulp and Timber Company. It is obvious.

“By Mr. Bernbaum:

“Q. Directing your attention again to the period between September 1st, 1951, to March 1st, 1952, during that period were you contacted by Mr. Joseph O’Reilly with regard to any purchases of board from Puget Sound Pulp and Timber Company? “A. Yes.

“Mr. Lane: What period of time was that?

“Mr. Bernbaum: September 1st, 1951, to March 1st, 1952.

(Deposition of John H. Frankl.)

“Mr. Lane: Your testimony was ‘Yes’?”

“The Witness: Yes.

“By Mr. Bernbaum:

“Q. How and in what manner were you contacted by Mr. Joseph O'Reilly during this period?”

“A. The same way as before: either we called him up or he called us up—basically no difference.

“Q. On approximately how many occasions during this [227] period could you tell us, to the best of your recollection, that you were contacted by him?”

“A. That is something I cannot answer.

“Q. Just approximately.

“A. It would be very—I would say—I would feel that I would have contacted O'Reilly each time I needed board, which would have been at least, roughly, once a month; or vice versa, he would have contacted us, unless, again, it was covered by large blanket orders in advance, you see.

“Q. During this period did he contact you in connection with purchases of paper from Puget Sound Pulp and Timber Company or was it on behalf of any other company he contacted you during this period?”

“A. I personally was contacted with regard to Puget Sound, purchasing of the board from Puget Sound.

“Q. Were you ever advised by Mr. O'Reilly or any other representative of Puget Sound Pulp and Timber Company as to when Mr. O'Reilly was go-

(Deposition of John H. Frankl.)

ing to separate his activity from Puget Sound Pulp and Timber Company? “A. No.

“Q. Directing your attention to March 1st, 1952, and subsequent to that date, and up to the present time, did you make any purchases of supplies from Puget Sound Pulp and Timber Company? [228]

“A. Continuously.

“Q. And to this date and in the future you are contemplating making purchases from Puget Sound Pulp and Timber Company, is that correct?

“A. That is correct.

“Q. Subsequent to March 1st, 1952, with whom or with what representative of Puget Sound Pulp and Timber Company did you handle your purchases? “A. Subsequently?

“Q. After March 1st, 1952.

“A. First Russell De Lopez and lately Roy Anderson, and now exclusively Roy Anderson.

“Q. But that was definitely commencing with approximately March 1st, 1952, to the best of your recollection, is that correct?

“A. That is correct.

“Mr. Bernbaum: That is all.

“Cross Examination

“By Mr. Lane:

“Q. Mr. Frankl, you testified that after September the 1st, 1951, Mr. O'Reilly contacted you or you contacted him regarding purchasing of pulp from the Puget Sound Pulp and Timber Company.

“A. Board.

(Deposition of John H. Frankl.)

“Q. Board? “A. Yes.

“Q. Did you have any correspondence with him during that time?

“A. With him or with Puget Sound?

“Q. Well, either with Mr. O'Reilly or with Puget Sound.

“A. Oh, yes. Continuously. Could have been concerning traffic, how a car would have been directed; could have been a wire from Puget Sound which I get—like we get each time: ‘Your order number,’ so-and-so, ‘was shipped via line,’ car and so on.

“It would be a little piece of correspondence, by saying, ‘I can not make your board by the specified time,’ or ‘You have to wait a couple of weeks.’ It would be within the range of our board purchases, I would say.

“That was specifically with Joe O'Reilly or with Russell De Lopez at this particular time, I can't remember that. But it could have been with both or with one or the other.

“Q. Would you have your correspondence that you had with Mr. O'Reilly from September 1st, '51, on?

“Mr. Bernbaum: Just a moment, Mr. Lane. I think he has already answered that question. [230] In other words, he has answered that the correspondence wouldn't necessarily be with O'Reilly, it would be with Puget Sound.

“It might be with De Lopez.

(Deposition of John H. Frankl.)

"The Witness: It was never with Joe O'Reilly personally, under no circumstances.

"By Mr. Lane:

"Q. You never had any direct correspondence with Mr. O'Reilly?

"A. Personally with him?

"Q. Yes.

"A. No. I would call him up or write him to Puget Sound, attention Joe O'Reilly, and start my letter, 'Dear Joe,' or something like that.

"Q. After September 1st, 1951, if you wanted to talk to Mr. O'Reilly, where did you call him?

"A. After September——

"Q. Yes. "A. ——1st, '51?

"Q. Yes.

"A. Was it already when he was in Richmond? I don't remember that.

"Q. I am asking you if you remember. You testified that you talked to him approximately once a month from September 1st, 1951, on. [231]

"A. Yes. But you asked me where.

"Q. Where did you call him? Where did you call him?

"A. It could have been Richmond. It could have been Richmond, dropped in here—three alternatives: he came in, call him in Richmond or Bellingham. It was one or the other.

"Q. Do you recall talking to him in Bellingham after September 1st, 1951?

"A. I wouldn't swear to that. You said Bellingham, now?

(Deposition of John H. Frankl.)

“Q. Yes.

“A. That I could not swear. I couldn't swear to that. But I am sure I talked to him; whether from Bellingham, that is a little hard to remember.

“Mr. Bernbaum: In other words, you are sure you spoke to him on many occasions after September 1st, 1951?

“The Witness: Yes.

“Mr. Bernbaum: But you don't know where?

“The Witness: Where or when.

“Mr. Bernbaum: But you don't know from where the conversations emanated?

“The Witness: I could dig up the correspondence and that would cover whether we directed letters to Bellingham or Joe O'Reilly came in. I could not answer [232] truthfully whether we called him in Bellingham or he dropped in here.

“But I am sure we did business together, if that is what you mean.

“By Mr. Lane:

“Q. All of your orders were placed over the telephone, were they, for paper board?

“A. Some over the telephone, but all of them confirmed. [233]

* * * * *

“Q. I was just wondering if you recall those were confirmed with Mr. O'Reilly after September 1st, 1951.

“A. Mr. O'Reilly didn't confirm the orders. The mill confirmed it. That is exactly—that is for years.

(Deposition of John H. Frankl.)

I can't recall any other form from Puget Sound than this one you see here, up to this date. [234]

* * * * *

“Q. Did you purchase board from the California Paper Board Company during that time?

“A. California? In Richmond?

“Q. From 1951 or '52.

“A. Not one ounce.

“Q. You never purchased from Mr. O'Reilly's new company?

“A. Not one ounce. I don't even know if he ever produced at this time our grade of board. If he would have—if he would have liked—if he was able to supply it, that I can't answer.

“Mr. Bernbaum: But you never purchased any?

“The Witness: No. [236]

* * * * *

“Q. Did you have knowledge as to when Mr. O'Reilly left the Puget Sound Pulp and Timber Company and went with the California Paper Company?

“A. I couldn't answer that question. But I could answer as follows: that everybody knew that Joe O'Reilly more or less simultaneously—he is an officer of Puget Sound and the same time associated with another mill, which sounded funny to me because it is an unusual procedure.

“But it wasn't interesting to me. It was besides the point.

* * * * *

“Mr. Bernbaum: California Paper Board did

(Deposition of John H. Frankl.)

not solicit any business from you during the period commencing September 1, 1951——

“The Witness: For California?”

“Mr. Bernbaum: For California Paper Board.

“The Witness: No.

“Mr. Bernbaum: To March 1st, 1952?”

“The Witness: No. He couldn't because he didn't make it. How can he sell board which he couldn't make? [237]

“Mr. Bernbaum: You never purchased any board or any supplies of any kind from California Paper Board?

“The Witness: No, sir.

“Mr. Bernbaum: Either during the period commencing September 1, 1951, or to this date, is that correct?

“The Witness: That is correct.

“By Mr. Lane:

“A. Do you recall, Mr. Frankl, when you stopped contacting Mr. O'Reilly or when he stopped contacting you? Is there any way you can fix that approximate date?

“Mr. Bernbaum: You mean on behalf of California?

“Mr. Lane: On behalf of the Puget Sound Pulp and Timber Company.

“Mr. Bernbaum: Paper Division?

“Mr. Lane: Yes.

“The Witness: I mean, if I go dig out—dig around in our correspondence, then I could answer. But offhand, just like that, I couldn't answer that.

(Deposition of John H. Frankl.)

But I would have to dig in our correspondence. That would be easy. I mean, it was very simple because when Joe O'Reilly left, so to say, or disappeared from the scene, then the man—then Russell De Lopez came and tried to sell, and sold; which exact date it was, it is hard to determine. [238] I couldn't tell you that.

“By Mr. Lane:

“Q. Mr. Frankl, Mr. O'Reilly claims that he performed service for the Pulp Company after September the 1st, 1951, up to and during the end of February, '52, and we don't think he did.

“Now, during that period of time did you contact him or did he contact you with reference to purchase of paper board from the Pulp Company?

“A. Oh, yes.

“Q. You are positive of that?

“A. Oh, yes. Either I contacted him, or if I didn't contact him I certainly bought from Puget Sound, being——

“Q. Do you recall whether you contacted him or he contacted you during that period of time?

“A. Offhand I would say that Joe O'Reilly came more often to us, to our office, than vice versa, than I would call up.

“Q. I am referring to that particular time.

“A. Yes.

“Q. You are sure of that?

“A. Oh, yes. Yes. Oh, yes. There was nobody else. I mean, the question is very simple.

(Deposition of John H. Frankl.)

“Mr. Bernbaum: That is all right. You have answered the question. [239]

“The Witness: There was nobody else here.

“Mr. Lane: That is all I have.

“Mr. Bernbaum: Just one question.

“Redirect Examination

“By Mr. Bernbaum:

“Q. Would you say to the best of your recollection at this time, that it was subsequent to March 1st, 1952, that you were contacted by somebody else from Puget Sound Pulp and Timber Company?

“A. I couldn't recollect. I couldn't answer that.

“Q. But you do know that during the period we have mentioned you were contacted or——

“A. You pin me down to a specific date and that I couldn't answer yes or no. But I know we bought board at this time, that I know, and I know we bought it—that my personal impression, rightly or wrongly, was that Joe O'Reilly still sells board, for whatever reason.

“Q. You do remember specifically during the period September 1st, 1951, to March 1st, 1952, that either you contacted Mr. O'Reilly or he came to your plant?

“A. That is correct. [240]

* * * * *

“Recross Examination

“By Mr. Lane:

“Q. Could you confirm that in any way by looking at your records, Mr. Frankl?

(Deposition of John H. Frankl.)

“Mr. Bernbaum: Well, I don’t know whether his records would show that, according to his testimony.

“Mr. Lane: Let him testify whether his records would show that.

“Mr. Bernbaum: You mean whether his records would show, Mr. Lane, whether he had a telephone call or whether he had a visit from Mr. O’Reilly?

“Mr. Lane: Or whether he put in an order——

“The Witness: It would be on one of the invoices still on hand that there is the copy of our purchase order showing ‘Attention: Joe O’Reilly;’ it could be. Whether that will be the case, I can’t answer that.

“But basically that is besides the point because at the time—which is not in doubt as to Joe O’Reilly activities, where we are all of us sure he worked for Puget Sound, I still placed orders with him and sometimes I put ‘Attention: Joe O’Reilly,’ and sometimes I didn’t.

“Mr. Bernbaum: You are talking now specifically [241] from the period September 1 to March—September 1, ’51, to March 1st, 1952?

“The Witness: That is correct.

“Mr. Bernbaum: That is all.

“By Mr. Lane:

“Q. You see, that is where one of the disputes in this litigation is; we don’t think Mr. O’Reilly performed any service from September, ’51 on.

“A. Who sold the board, then?

“Q. I beg your pardon?

“A. Who sold the board for Puget Sound as far

(Deposition of John H. Frankl.)

as we are concerned? Who sold for Puget Sound at this time?

“Q. Mr. O'Reilly left them.

“A. Yes. I know. But there was nobody else to sell board. * * * * * [242]

“(Thereupon the record was read as follows:

‘Q. Mr. Frankl, you have looked through your records for the period September, '51, through February, '52, and do you find anything in your records indicating that you contacted Mr. O'Reilly or that he contacted you in connection with your purchase from [243] the Puget Sound Pulp and Timber Company of paper board?’)

“Mr. Bernbaum: What is your answer?

“The Witness: The answer is yes. Here is, for instance, a letter to Joe O'Reilly, September 14th, 1951, specifically dated.

“By Mr. Lane:

“Q. Is that the only indication that you find in your file as to——

“A. There are many——

“Q. Will you just complete your examination?

“Mr. Bernbaum: Did you get the last answer?

“(Record read.)

“Mr. Lane: That is a letter to the Pulp Company dated September 14th, 1951, attention Joe O'Reilly.

“The Witness: And that indicates specifically that I wanted—expect board through Joe O'Reilly.

“By Mr. Lane:

“Q. And it refers to a carload of paper board

(Deposition of John H. Frankl.)

that you wished to be shipped during the last week of September, '51, is that correct?

"A. That is correct.

"Q. Is there anything else in your file that would indicate direct contact with Mr. O'Reilly?

"A. Can I read another letter? [244]

"There is a letter addressed to Joe O'Reilly, dated August 28th, asking to delay shipment of a specific board towards the end of September.

"Q. That is dated what?

"A. August 28th, but refers to September transaction.

"Q. I am interested in the period from September, '51, until during '52, if you have it.

"Mr. Bernbaum: Other than those he has mentioned, you mean?

"Mr. Lane: Yes.

"Mr. Bernbaum: Let me ask him this question.

"Mr. Lane: Let him just look and see if he has any.

"Mr. Bernbaum: What we want you to look for particularly and only, Mr. Frankl, please, is just to see whether the letter or any records show any reference to a telephone call that you had, whether you actually made mention in your correspondence of a telephone call with Mr. O'Reilly, or how you handled that. Is that correct, Mr. Lane?

"Mr. Lane: Or whether he had any correspondence with Mr. O'Reilly.

"Mr. Bernbaum: Pertaining to a specific telephone call during that period.

(Deposition of John H. Frankl.)

"The Witness: None, with the exception of the [245] one I showed you.

"By Mr. Lane:

"Q. The one I mentioned?

"Mr. Bernbaum: September 14th letter?

"The Witness: That's right. * * * * *

"Further Redirect Examination

"By Mr. Bernbaum:

"Q. Mr. Frankl, will you please tell us whether or not it was a part of your records, of your method of keeping records in Laminated Paper Products Company, to keep a record of telephone calls or conversations that you had with any representative of Puget Sound Pulp and Timber Company during 1949, 1950, 1951 and 1952, and up to the present time.

"A. Well, I would—if a salesman drops in and sells board to me and I buy the board, I might write a letter and say, 'Confirming our conversation,' and so on; that I would.

"But I would not—even a telephone call. But there was no specific—there are no minutes kept to record telephone calls. [246]

"Q. You do not keep records of telephone calls and what they pertain to? "A. No.

"Q. As a general practice, as a method of keeping records by Laminated Paper Products Company? "A. No.

"Q. That was not your method of doing business? "A. No.

(Deposition of John H. Frankl.)

“Q. You kept no minutes of such telephone calls calls? “A. No.

“Q. And you did not do so in connection with your method of doing business with Mr. O'Reilly during the period of September 1, 1951, to March 1st, 1952, is that correct?

“A. That is correct.

“Q. You are at this time relying on your specific recollection of your telephone conversations with Mr. O'Reilly pertaining to your purchases from Puget Sound Pulp and Timber Company?

“A. That is correct.

“Q. Particularly with reference to the period that we have mentioned; that is, September 1, 1951 to March 1st, 1952, is that correct?

“A. That is correct.

“Mr. Bernbaum: That is all. [247]

“Further Recross Examination

“By Mr. Lane:

“Q. Mr. Frankl, in looking through your correspondence there covering the period from September 1st, 1951, through February, '52, did you find your correspondence that was directed to any particular person at the Pulp Company?

“A. Yes.

“Q. Who?

“A. Russell De Lopez. That is correct. * * * * *

“Further Redirect Examination

“By Mr. Bernbaum:

“Q. In looking through your records, you also

(Deposition of John H. Frankl.)

found reference to correspondence with Mr. Russell De Lopez prior to September 1, 1951, did you not?

"A. That is correct.

"Q. And that when you state that correspondence refers to Russell De Lopez, to what phase of your purchases from Puget Sound Pulp and Timber Company, both before and after September 1, 1951, does that correspondence refer to? [248]

"A. Repeat that once more, please.

"Q. In what capacity did you refer to Mr. Russell De Lopez in connection with the correspondence that you have reference to subsequent to——

"A. Well, the correspondence at this particular time refers to all kinds of transactions, to all kinds of transactions.

"Q. I am directing your attention now to Mr. Russell De Lopez and the correspondence you directed to his attention prior to September 1st, 1951.

"A. Yes.

"Q. What did that have reference to?

"A. Traffic.

"Q. Traffic. You mean time of shipment?

"A. Time of shipment, cancellation, postponement, routing of shipments, and so forth.

"Q. Was there any difference during the period commencing with September 1, 1951, through February, 1952?

"Mr. Lane: He has answered the question.

"Mr. Bernbaum: No, just a minute.

"Q. It still referred to traffic?

(Deposition of John H. Frankl.)

“A. No, no longer. At that particular—although Joe O’Reilly would have sold board to us and we have bought through him from Puget Sound, at this particular time I had to correspond automatically much more and [249] continuously more with Russell De Lopez because at this time for a reason which was none of my business, Joe O’Reilly wasn’t as readily available at Puget Sound, at Bellingham, as he was before that time.

“Q. You did keep contact with him?

“A. With whom?

“Q. Joe O’Reilly. “A. That is right.

“Q. That is definite? “A. Yes.

“Q. That is from September 1, 1951, to February, ’52?

“A. Yes, solely buying more board through him.

“Q. Through Mr. O’Reilly?

“A. But it shows through the correspondence more has been shown with Mr. De Lopez at that specific time because Joe O’Reilly wasn’t as readily available in Puget Sound. Before I could lift up the telephone and get him.

“Q. You did get in touch with Mr. O’Reilly all the time during that period?

“A. He would drop in, like I testified before.

“Mr. Bernbaum: That is all.

“Mr. Lane: That is all.”

The Court: This deposition, as read, of the witness John H. Frankl is received in evidence as a part of the plaintiff’s case in chief with like [250] effect as if that witness were present, had been

(Deposition of John H. Frankl.)
sworn, and was testifying orally from the witness stand.

Mr. Short: The plaintiff rests if the Court please.
* * * * * [251]

RALPH M. ROBERG

called as a witness by and on behalf of defendants,
having been first duly sworn, was examined and
testified as follows:

Direct Examination

* * * * * [252]

Q. (By Mr. Evans): Will you state your present occupation, please?

A. I am Vice President of the Puget Sound Pulp and Timber Company.

Q. How long have you held that position?

A. About ten years.

Q. I neglected to ask you—will you give us your home address?

A. 120 Hawthorne Road, Bellingham.

Q. Now, will you state what, if any, position you ever held with the Bellingham Paper Products Company?

A. When we first organized, I was President of the Bellingham Paper Products Company, and was until it was dissolved.

Q. Now, up until the time that company was dissolved, will you state whether or not you also carried on your functions as Vice President of the Puget Sound Pulp and Timber Company?

(Testimony of Ralph M. Roberg.)

A. I did.

Q. Now, during the period of time that Bellingham Paper Products Company was in existence, will you state who actively managed that company?

A. Mr. O'Reilly was the active manager of the company.

Q. Will you state whether or not you or any one else [253] interfered with his method of managing it?

A. No, I would say not.

Q. Now, will you state whether or not you had any part in any decisions as to whether the building which houses the paperboard mill would be built to a capacity to accommodate two machines rather than just one?

A. I would say that was—the policy of that was more or less decided by meetings with other members of the company, other executives of the company.

Q. Will you state whether or not Mr. O'Reilly was a member of the board of the paperboard company?

A. He was on the Board of Directors, yes.

Q. Will you state what were the considerations that led to the building being built so as to accommodate two machines rather than just the one?

A. Well, there were many things that we thought of and discussed at the time, but I think one of the first points that came up was that we had previously spent a considerable amount of money and research to look into the plywood overlay of pulp, and we left a place there either for a paper machine or for

(Testimony of Ralph M. Roberg.)

some other kind of machine that would do that job.

Q. Now, will you state whether or not at any time you had any conversation with Mr. O'Reilly with regard to reducing the rate of his commission?

A. Yes.

Q. Do you recall approximately when that conversation took place?

A. It was on a—I think the 28th of January 1949.

Q. Will you tell us where that conversation took place?

A. It took place in my office. Mr. O'Reilly came to my office.

Q. Was there any one else present beside you and Mr. O'Reilly? A. No.

Q. Will you tell us, as near as you can remember, what was said by both you and Mr. O'Reilly with regards to this subject?

A. With regard to that particular matter ?

Q. Yes.

The Court: Read the last three questions and answers.

(Whereupon the last three questions and answers are read by the court reporter.)

A. Mr. O'Reilly said he was going to voluntarily reduce his sales commission from three percent to one and one-half percent, and I asked him what prompted it, and he said he thought the business wasn't doing too well. I said: "That is self evident."

That practically concludes the conversation as far as that matter is concerned.

(Testimony of Ralph M. Roberg.)

I then called our accounting department. We agreed—pardon me—we agreed previously to set the date as of January 1, 1949. I called our accounting department and they either asked me to give them a memorandum to that effect or I write a memorandum and send it to them to that effect or I ask them, so I thereupon called a secretary and dictated a memorandum to that effect.

Q. Will you state whether or not the preparation of such a memorandum is a matter of regular business practice?

A. In a matter of finances, yes. In a matter of business, many other memoranda are not dictated.

* * * * *

Q. (By Mr. Evans): You have been handed what has been marked for identification as Defendants' Exhibit A-10. Will you state whether or not you can identify that? [256] A. Yes.

Q. Without reading from it, can you tell us what it is?

A. A note to Mr. Rogers that Mr. O'Reilly had voluntarily reduced his commission.

The Court: Do not state what is in it.

Q. (By Mr. Evans): State whether or not you signed the piece of paper which is marked Exhibit A-10? A. I did.

The Court: Whose signature is on the paper, if you know?

Witness: That is my signature. I signed it on this date.

The Court: You may proceed.

(Testimony of Ralph M. Roberg.)

Mr. Evans: I will now offer Exhibit A-10 solely for the purpose of fixing a date.

Mr. Short: I think the document is objectionable as being self-serving.

The Court: You have not proved it is a business document I believe, and you may offer further testimony if you wish to do so.

Mr. Evans: Very well.

The Court: Counsel made some statement about what he intended to prove regarding that, but I do not [257] remember hearing the proof. Proceed.

Q. (By Mr. Evans): Will you state whether or not memos of this type are made by you and others in your organization as a matter of usual course of business?

A. Matter of usual course of business.

Q. Will you state whether or not this memorandum was made in keeping with that business practice? A. Yes.

Q. Will you state what is the purpose of making such memos of this type?

A. What is the purpose?

Q. Yes.

A. To advise the accounting department as effective as of that date the commission is reduced.

* * * * * [258]

Q. (By Mr. Evans): Will you state whether or not Exhibit A-10 for identification was prepared by you as a permanent record of some event or transaction? A. This document?

Q. Yes.

(Testimony of Ralph M. Roberg.)

A. It should be a permanent record if it is kept in the file in the accounting department.

Q. Will you state whether or not it is the business practice and custom in your organization to retain such memos as a part of your permanent record? A. It is.

Q. Will you state who Mr. Clayton Rogers is, please?

A. Mr. Clayton Rogers is our head accountant.
* * * * * [260]

Q. Will you state whether or not Exhibit A-10 is addressed to Mr. Clayton Rogers?

A. It is.

Mr. Evans: I will now reoffer Exhibit A-10.

Mr. Short: Same objection if the Court please.

The Court: Do you wish the statement you made in connection with the offer to still pertain or do you wish to withdraw that statement and make an offer, a new offer, or what is your wish?

Mr. Evans: My sole purpose in offering it, and I am willing to let it be limited, is to fix a date.

The Court: For that limited purpose it is offered as I understand it. Do you so understand?

Mr. Short: I understand that, Your Honor. The objection is the same, together with the additional objection that by his own testimony this witness is not the custodian of this record and is not qualified to testify as to the matters he just referred to.

* * * * * [261]

The Court: That objection is overruled.

* * * * *

(Testimony of Ralph M. Roberg.)

Mr. Evans: I am offering this for the purpose of fixing a date, the date of the conversation which this witness has just testified to, being Jan. 28, 1949.

Mr. Short: May it please the Court, it was not used, as I understand, by Mr. Evans to refresh this witness' recollection, which is now the stated purpose of the offer.

The Court: The objection is overruled.

Defendants' Exhibit A-10 is now admitted for the limited purpose stated by counsel offering it.

* * * * *

Q. (By Mr. Evans): Now, Mr. Roberg, will you state whether or not in the conversation with Mr. O'Reilly there was any mention as to whether the reduction was to be for any period of time?

A. None whatsoever.

Q. Now, will you state whether or not at any time thereafter Mr. O'Reilly made any demand or even suggestion that his compensation be increased over and above one and one-half percent?

A. He never did. * * * * * [263]

Q. (By Mr. Evans): Will you state whether or not you had any duties with regard to the paper-board division at the time you had the conversations with Mr. O'Reilly which you have mentioned?

A. Yes.

Q. What were those duties?

A. More or less executive duties and advisory duties.

Q. In what regard?

A. With regard to the paperboard business.

(Testimony of Ralph M. Roberg.)

Q. Who was managing the paperboard mill at that time?

A. Mr. O'Reilly

Q. After Puget Sound took over the paperboard up until September of 1951, who actually managed and ran the paperboard division?

A. I would say that I more or less did.

Q. What duties did Mr. O'Reilly have?

A. He had none.

Mr. Short: This was after what date? I am sorry.

Mr. Evans: May I ask the reporter to read the last two questions and answers?

(Whereupon the last two questions and answers are read by the court reporter.) [265]

A. He had none.

The Court: After?

Witness: After taking over the board division. I misunderstood. After the Puget Sound Company took over the board mill from the Bellingham Paper Products, Mr. O'Reilly was still managing it until he left the company. * * * * * [266]

Q. (By Mr. Evans): Mr. Roberg, do you recall approximately when Mr. O'Reilly left the employ of Puget Sound Pulp and Timber Company?

A. Final departure?

Q. Yes.

A. September 1, 1952, I believe. * * * * * [269]

Q. Between September 1, 1951 and the first of March, 1952, did you have any communication with Mr. O'Reilly? A. None whatsoever.

(Testimony of Ralph M. Roberg.)

Q. Will you state whether or not you were aware of any work Mr. O'Reilly was doing on behalf of Puget Sound Pulp and Timber Company?

A. I was not.

Q. Will you state whether or not to your knowledge Mr. O'Reilly ever again came into the premises of the Puget Sound Pulp and Timber Company between September 1, 1951 and March 1952?

A. Not to my knowledge, he did not.

Q. Will you state whether or not you were present yourself on the premises of the company during that period of time ?

A. I would say all the time.

Q. Now, will you state whether or not the California Paper Products Company, when it was in business and producing, was a competitor of the board division of Puget Sound Pulp and Timber Company? * * * * * [271]

A. Yes, they were competitors.

Q. (By Mr. Evans): Now, will you state whether or not the Salinas Wax Paper Company was a customer of Puget Sound Pulp and Timber Company before Mr. O'Reilly went to work for them?

A. Yes, they were for many years.

Q. Now, will you state whether or not the board division of Puget Sound Pulp and Timber Company was oversold by 40% during the period September 1, 1951 to March 1952?

A. I would say they are undersold.

Q. Will you state whether or not to your recollection any orders were procured during that pe-

(Testimony of Ralph M. Roberg.)

riod of time that were not attributable to any customers that Mr. O'Reilly had previously procured?

A. In the dilemma we were in, I believe it was February of that year that I personally communicated with New York, to our agents there who also handle export board business, and I solicited business for our mill. They went out to South Africa and obtained an order for approximately 40% or 50% of the capacity of the mill, on which we ran, and we were in good shape thereafter.

Q. Will you state what, if any, action would have had to have been taken had it not been for your efforts [272] in procuring the order which you have just mentioned and others of similar type?

A. We considered we would have to close down the mill for a period.

Q. Will you state whether or not Mr. O'Reilly had permission from you or any of the other officers of the company, to your knowledge, to go to Ottawa to negotiate a purchase of a new machine?

Mr. Short: Objected as immaterial, if the Court please.

The Court: Overruled.

A. No.

The Court: Will you state, Mr. Roberg, whether you or, to your knowledge, anybody else connected with the defendant company other than Mr. O'Reilly had anything to do with initiating his trip on the occasion last mentioned?

Witness: No, we did not.

(Testimony of Ralph M. Roberg.)

The Court: Was it a matter in his discretion to do or not to do as he pleased?

Witness: It was his choice. I wouldn't say it was his discretion.

Q. (By Mr. Evans): Will you state who took over the management of the sale of the paperboard division upon Mr. O'Reilly's departure? [273]

A. Mr. O'Reilly departed about the day after Labor Day in September, and I appointed Mr. De Lopez to go up and take charge of the sales and the order sheet, and he reported to me I think the next day full details on the situation.

Q. Will you state whether or not Mr. O'Reilly had any authority to be representing the Puget Sound Pulp and Timber Company after his departure in the early part of September, 1951?

A. I would say none whatever. * * * * *

Q. (By Mr. Evans): With regards to what I might call the chain of command, will you state whether or not Mr. O'Reilly was under you or over you?

A. At what time? Never was over me. I was over him at all times he was with the company.

Q. Will you state whether or not you were one of the immediate superiors to whom he should report at any time a report was required? [274]

A. I was. * * * * *

Cross Examination

Q. (By Mr. Short): Prior to Mr. O'Reilly's coming with the Puget Sound Pulp and Timber

(Testimony of Ralph M. Roberg.)

Company or its subsidiary, the Bellingham Paper Products Company, did either of those companies produce any paperboard? A. No.

Q. Then prior to Mr. O'Reilly's coming with the company, if the Salinas Wax Paper Company was a customer it was not a customer of paperboard, was it?

A. We didn't make exactly paperboard in the board mill. We made a lettuce pad which was a substitute for it on account of the war conditions.

Q. The Salinas Wax Paper Company was a customer of what type of product prior to——

A. The same type of product, lettuce pads.

Q. Did you manufacture lettuce pads at Puget Sound Pulp and Timber Company before you built a paper mill?

A. Yes, but in different form. We started with this company, if I may add, at the time of the war, with the Salinas Valley, about 1942 or '3. [275]

Q. Mr. Roberg, do you have any independent recollection, and by that I mean a recollection independent of any record, of the day or date upon which you and Mr. O'Reilly had your conversation in reference to his reducing his percentage?

A. Do I remember the date?

Q. Do you remember the date independently of any record?

A. I certainly made the record at the time it happened, and I have known that all the time, yes. It was on January 28th.

Q. You so testified? A. Yes.

(Testimony of Ralph M. Roberg.)

Q. You have so testified from this exhibit, the memorandum transmitted to Mr. Rogers?

A. That was dated the same day, yes.

Q. It would not have been necessary in the normal course of your business to have transmitted that memorandum to Mr. Rogers any time before February 1, 1949, would it?

A. I transmitted it immediately.

Q. That is not the question. It would not be necessary for the accounting department to compute his percentage of net sales until after January 31, 1949, would it?

A. That I would not know. I, however, should have the memorandum there so they can pay according to the [276] agreement.

Q. And you testified that you notified the accounting department orally before this memorandum was prepared?

A. About five minutes before.

* * * * *

Q. The building in fact was built, was it not, with a pit which would receive a paperboard machine?

A. That is right, a hole in the floor.

Q. Yes, similar to the hole in the floor, as you call it, in which the existing machine is now rested, isn't [277] that correct?

A. No, it is larger.

Q. Why?

A. Because we didn't know what kind of machine we were putting in there, and the machine

(Testimony of Ralph M. Roberg.)

that Mr. O'Reilly had and suggested was too small for a great modern production.

Q. Well, the other pit or floor recess for the proposed additional machine was larger and was constructed in accordance with a blueprint of a paperboard machine, was it not?

A. Varying sizes I believe would fit into that pit, I think from 98" to 104" in width. [278]

* * * * *

A. Well, the second floor is a concrete floor.

Q. Is there an opening in that floor?

A. That is the hole we are talking about. That is the open hole which is the hole in the floor, second floor.

Q. Is there also an opening in the ceiling above that? A. No.

Q. There is not? A. No.

Q. Over the existing paperboard machine which is now in operation, is there an opening in the ceiling?

A. No, not of any size. There would be a vent pipe.

Q. Well, isn't it a fact that this paperboard machine which is now in operation at the mill—I have never seen it—does it not operate on two floors?

A. The machine?

Q. Yes.

A. The drive is on the first floor. [279]

The Court: Mr. Roberg, it might be of some assistance to the Court to understand better the place which was left in the construction of the

(Testimony of Ralph M. Roberg.)

building to accommodate the installation of a machine later.

Witness: That is right. No decision was made as to what kind of machine or what it was for.

* * * * *

Witness: Supported the second floor, and the machines were to be there.

When we didn't put in the other machine, we used one floor for storage of paper stock and things of [280] that sort.

The Court: Was there any concrete foundation at the second floor level on which it was expected that that machine, if it was installed, would rest?

Witness: Naturally. There would be beams of sufficient strength to support a future machine.

The Court: Well, on that floor was there any depression left in the nature of a pit or an elevation below the normal elevation of the second floor?

Witness: There was left one panel or a section of it which we floored over when we came to no decision. [281]

* * * * *

Q. (By Mr. Short): Was there any change in operation of the board mill as between 1948 and 1949? A. Change in operation?

Q. Yes. A. In what way?

Q. In any way?

A. Always change in any operation.

Q. Well, I mean in any substantial way.

A. Not that I recall except—you mean as regards sales?

(Testimony of Ralph M. Roberg.)

Q. Well, as regards any method of production or any one's duties in regard to the paperboard division as between 1948 and 1949?

A. Oh, I think Mr. O'Reilly was——

Q. Who?

A. (Continued) Mr. O'Reilly was the manager of the board division.

Q. In both years?

A. Well, I can't recall your years.

Q. I am asking you in reference to 1948 and 1949. [282]

A. Yes, he was officially—I would say he was manager, but he wasn't around very much.

Q. And his duties and so forth were the same during that time, both before 1948 and after?

A. His duties were the same.

Q. Do you mean that in 1949 he wasn't around very much?

A. Well, I wouldn't want to pin it to any one year. He wasn't around very much at all. [283]

* * * * *

LAWSON P. TURCOTTE

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Evans): What is your present position?

A. President of the Puget Sound Pulp and Timber Company.

(Testimony of Lawson P. Turcotte.)

Q. How long have you held that position?

A. Since 1950.

Q. What was your position prior to that time?

A. I was Executive Vice President of the company from 1942 until I became President. [284]

Q. What was the general nature of your duties from 1942 until you became President?

A. I was manager of all the properties of Puget Sound Pulp and Timber Company, Executive Vice President and Manager. The President of the company resided at that time in San Francisco.

Q. What have been your duties since you became President?

A. Well, much the same except as to the name of "President" as against "Executive Vice President"—in charge of all of the operations of the Puget Sound Pulp and Timber Company.

The Court: Where did you work before you became connected with this company?

Witness: I came down from Canada, Your Honor.

The Court: How many years ago?

Witness: I have been with this company since 1926.

The Court: Before that, did you live in Canada?

Witness: Yes, in Alberta, and I was born in Quebec.

The Court: What kind of work did you do in Canada?

Witness: Accounting, and prior to that I was in the Army. [285]

(Testimony of Lawson P. Turcotte.)

The Court: What kind of accounting, and in what business, if any?

Witness: In lumber.

The Court: Did you have anything to do with pulp or paper manufacture or distribution?

Witness: Not at that time.

The Court: It was only since you came——

Witness: Since 1926.

The Court: (Continuing) ——since you came to this country that you have had anything to do with pulp or paper?

Witness: Yes, sir.

The Court: You may inquire.

Q. (By Mr. Evans): Mr. Turcotte, will you state whether you were ever aware of any demand or claim by Mr. O'Reilly for anything more than the one and one-half percent sales commission from **January 1, 1949** until the termination of his employment? A. I was not.

Q. Will you state whether or not you at any time had any conversations with Mr. O'Reilly with regard to the termination of his connection with Puget Sound? A. Yes, I did.

Q. Do you recall approximately when the first of [286] those conversations took place?

A. I would say right after we discovered that Mr. O'Reilly intended to form another corporation in California in the paperboard business, probably March or April of '51.

Q. Will you state whether or not that was just one discussion or were there several discussions?

(Testimony of Lawson P. Turcotte.)

A. As I remember, there were two or three discussions because the Board and myself thought that——

Mr. Short: Object to this.

The Court: Yes. Do not say what you thought. You can say what you said to him or what he said to you.

A. Well, I told Mr. O'Reilly that he could not serve as sales representative of the two companies with those companies in competition with each other—that is Puget Sound Pulp and Timber Company and California Paperboard Company.

Q. Now, will you state whether or not you suggested to Mr. O'Reilly a date upon which his services would be terminated?

A. Originally I suggested June 1.

Q. And what, if anything, did Mr. O'Reilly say to that?

A. Well, he seemed—he said that he thought he was not being treated fairly and that he would like to let [287] it go for another month or two, and I said: "All right." I said: "It can be August 31st or September 1st."

The Court: Of what year?

Witness: 1951. * * * * *

Q. (By Mr. Evans): You have been handed what has been marked Exhibit A-1, being a letter of July 12, 1951. Will you state whether or not you received that letter from Mr. O'Reilly?

A. I received it.

Q. Now, will you state whether or not prior to

(Testimony of Lawson P. Turcotte.)

that date you had made a proposal of termination of Mr. O'Reilly's services? A. I had.

Q. Will you state whether or not prior to July 12, 1951 you and Mr. O'Reilly had come to an agreement as to the date of his termination?

A. No. It was subsequent to this letter.

Q. Now, will you state whether or not after July 12, 1951, you and Mr. O'Reilly arrived at any agreement as to his termination date?

A. I don't know exactly this date, but it would be [288] after the latter part of July that Mr. O'Reilly and I met in my office and arrived at the agreement.

Q. Now, will you relate to us as accurately as you can remember this discussion you had with Mr. O'Reilly?

The Court: That date was what?

Witness: Of the letter?

The Court: No, the date you had this discussion.

Witness: The latter part of July.

Q. (By Mr. Evans): Of what year?

A. 1951. Mr. O'Reilly came into my office. I had this letter in front of me.

The Court: What letter is that?

Witness: Of July 12, 1951.

A. (Continued) We discussed the whole question of remuneration since the time Mr. O'Reilly came with the paperboard company as well as after dissolution of the company and his employment with Puget Sound Pulp and Timber Company.

At that time I had made some preparation as to

(Testimony of Lawson P. Turcotte.)

the discussions with Mr. O'Reilly in view of his letter. I told him what we had paid him during that period of from January 1, 1947 to the time of the meeting, which amounted to at that time something like a little under \$90,000.00 [289] in commissions. I also pointed out to Mr. O'Reilly that the company had purchased his stock which, on the basis of Mr. O'Reilly's contribution to the original paperboard company, was \$50,000.00, and for which we had paid him \$135,000.00. Taking his commissions——

The Court: Will you pause for just a minute, please? Will you read the last two sentences in his answer?

(Whereupon the court reporter read from the record as follows: "I told him what we had paid him during that period of from January 1, 1947 to the time of the meeting, which amounted to at that time something like a little under \$90,000.00 in commissions. I also pointed out to Mr. O'Reilly that the company had purchased his stock which, on the basis of Mr. O'Reilly's contribution to the original paperboard company, was \$50,000.00, and for which we paid him \$135,000.00")

The Court: Did you wish to indicate by that that he had paid for the stock \$50,000.00?

Witness: That is correct, Your Honor.

The Court: You may proceed.

A. (Continued) And that these two amounts of the sale of the stock and the commissions was in the neighborhood [290] of around \$185,000.00 that the

(Testimony of Lawson P. Turcotte.)

company had paid to Mr. O'Reilly during his tenure of approximately four and one-half years, and that I felt that he had been very fairly treated. At that time I made the remark that he had been paid more than the president of the company. So we talked it over and talked it over.

Mr. O'Reilly was proposing that he be paid commissions until December 31, 1952. I told Mr. O'Reilly that as far as separation date, that this was to be definitely September 1, 1951, and this was agreed upon. Thereupon, Mr. O'Reilly—Well, I am getting a little ahead—which was agreed upon as a separation date.

Mr. Short: Will you give the date again, please?

Witness: September 1, 1951.

A. (Continued) Thereupon Mr. O'Reilly continued with his conversation that he thought he had not been too fairly treated.

I remember that we discussed it for approximately one hour, and I finally made him the proposal that there was no question as to his termination date as an employee of Puget to be September 1, 1951, but that we would pay him at the same rate of one and one-half percent commission from September 1, 1951 to February 29, 1952.

Mr. O'Reilly accepted this proposal.

Mr. Short: I object to the conclusion if the [291] Court please.

The Court: The objection is overruled.

A. As far as I am concerned, Mr. O'Reilly accepted the proposal.

(Testimony of Lawson P. Turcotte.)

The Court: That objection is sustained as applied to the last remark, and the Court's ruling is set aside. The ruling now made by the Court is that the objection is sustained and the statement of the witness is stricken and the Court will disregard it.

Q. (By Mr. Evans): Will you state what, if anything, Mr. O'Reilly said in response to the proposal which you have just outlined?

A. Mr. O'Reilly accepted the proposal.

Mr. Short: The same objection.

The Court: In view of what has been said before, the Court feels the answer is not responsive and the objection is sustained and the answer is stricken.

I ask you to answer counsel's question, Mr. Turcotte.

Witness: Will you repeat the question?

The Court: Read Mr. Evans' question.

(Whereupon the question is read by the court reporter as follows: "Q. Will you state what, if anything, Mr. O'Reilly said in response to the proposal [292] which you have just outlined?")

A. I, of course, can't remember the exact words that Mr. O'Reilly used, but he did use words of acceptance of the proposal.

Mr. Short: Same objection and move to strike.

The Court: I think it should be stricken, and that is the order of the Court.

You may ask him what he recalls in substance and effect that Mr. O'Reilly said.

(Testimony of Lawson P. Turcotte.)

Q. (By Mr. Evans): Will you state what, in substance, Mr. O'Reilly said in response to your proposal which you have outlined?

A. Well, I just can't remember his exact words.

Q. Will you state the substance of what, if anything, Mr. O'Reilly said in response to your proposal?

Mr. Short: I think the question has been asked and answered, if the Court please.

The Court: That objection is overruled.

A. Well, as I remember, Mr. O'Reilly repeatedly stated that he thought he was not fairly treated. After my proposal to him, he said something like: "I guess that is it," and got up and left.

* * * * * [293]

Q. (By Mr. Evans): Will you state whether or not during your discussions with Mr. O'Reilly there was any mention of Mr. O'Reilly claiming an additional one and one-half percent commission over and above that which he had already received?

A. No.

Q. Will you state whether or not you were aware of any such claim for compensation or any such contention on behalf of Mr. O'Reilly?

A. I certainly was not.

The Court: Will you repeat for my convenience [294] what you said was the date that you said you told him his commissions would be paid to?

Witness: February 29, 1952, Your Honor.

The Court: Now, was there anything said on what basis——

(Testimony of Lawson P. Turcotte.)

Witness: At one and one-half percent rate based on the net sales of the company in those six months.

Q. (By Mr. Evans): Will you state whether or not your proposal was in any way influenced by Mr. O'Reilly's letter of July 12, 1951?

Mr. Short: I object to that. It is immaterial and irrelevant. What was in this man's mind would have no possible connection with what the contract or agreement actually was.

Mr. Evans: May it please the Court, I believe it is very relevant as to the state of the man's mind when he is entering into the contract as to whether or not he is relying upon a letter written by the person with whom he is dealing.

The Court: The objection is overruled.

A. Well, I certainly took into account that Mr. O'Reilly had reduced his commission from three percent to one and one-half percent when I made him the offer of the continuation of his one and one-half percent commission [295] for those six months.

The Court: What was it that he mentioned, if he did mention anything, as a detail of his feeling of unfair treatment during that conversation there that you mentioned that took place in July with the letter of July 12th before you?

Witness: Well, Your Honor, I could not understand why he felt that way. He had had——

The Court: (Interposing) I did not ask you that, Mr. Turcotte. I asked you what, if anything, he said about the details of his dissatisfaction. What

(Testimony of Lawson P. Turcotte.)

points did he make in that connection about what the company had done or had not done that he expected the company to do?

Witness: Well, he expected the company, according to his letter to continue his commission until the end of the contract or some date that he suggested.

The Court: What, if you know, was to be the end of the contract as stated by him or you on that occasion?

Witness: Well, if the five year contract had run, it would have been around the neighborhood that he suggested I think.

The Court: What did he suggest as the end?

Witness: He suggested December 31, 1952.

The Court: Can you think of any other details mentioned by him as a reason why he was unsatisfied with the deal he had received?

Witness: Yes. He made certain claims about the unsatisfactory quality of the raw materials going into the board. His main objection was to the condition of the screenings, which is a by-product of our pulp operation.

Now, those screenings as a by-product in the pulp operation—we always try to get every last fiber out for the higher priced product, and we are working all the time to reduce the screenings loss, which is a very cheap product, and we have done that continually.

The Court: What point was he making about it?

(Testimony of Lawson P. Turcotte.)

Witness: Well, he said they were not satisfactory for some of the production of board.

The Court: I still don't understand the detail that he complained about. Did he complain that more of those screenings should be saved and go into the paperboard that he was selling or less of the screenings?

Witness: He claimed that they should have been a better quality and more fibers left in the screenings. Well, our objective in making pulp is to get all the [297] good fibers out of the wood, and the screenings is a waste.

The Court: Did he talk about money that he was losing which he expected to receive from the company?

Witness: Well, he mentioned his voluntary reduction of commission.

The Court: And asked that that be restored, did he or not?

Witness: No, he did not. He asked that he be paid one and one-half percent commission, Your Honor.

The Court: But on this day in July 1951 is when I am talking about, not on that prior day when Mr. Roberg said that he voluntarily reduced his commission. I am talking about what he said on this date.

Witness: No. He never mentioned restoring it to three percent.

The Court: Can you think of any other detail of his expressed dissatisfaction other than what you

(Testimony of Lawson P. Turcotte.)

have mentioned already, which expression was made by him on that July date when you and he were discussing the details, further details, of his separation?

Witness: Well, he expressed dissatisfaction with his termination date, which was September 1st, and it was our proposal that at the same time his commissions would discontinue as of September 1, 1951.

The Court: You may inquire.

Q. (By Mr. Evans): Mr. Turcotte, will you tell us what part screenings play in the manufacture of paperboard?

A. Well, I am not an operating man, but the plant was originally constructed to use this waste product——

Q. Which product? Which plant?

A. The paper—the paperboard plant.

Q. Now, will you state whether or not there are one or two paperboard machines in the plant now?

A. There is one paperboard machine.

Q. If you were to install another machine, will you state where you would have to get your raw products——

A. Well, that would depend——

Mr. Short: Objected to as being entirely immaterial if the Court please.

The Court: Will you read the question?

(Whereupon the last question is read by the court reporter.)

The Court: The objection is sustained. No. The objection is overruled.

A. That would depend on what kind of boards

(Testimony of Lawson P. Turcotte.)

you were going to make. If we wanted to continue using our waste, the present machine takes all of it, and if we wanted to continue in the same grade as now, we would have to go [299] out and purchase screenings.

The Court: Suppose it is a question of your continuing the kind of work and the kind of product that he was dealing in. Just consider what he was dealing in. What about that?

Witness: We would have to go out and buy the raw materials instead of supplying it ourselves, and it would greatly have increased the cost of production. We felt it was not economical.

Q. (By Mr. Evans): Will you state whether or not the screenings that you now produce would support another machine? A. No.

Mr. Evans: Will you kindly hand the witness Exhibit A-2?

(Whereupon Defendants' Exhibit A-2 is handed to the witness by the bailiff.)

Q. (By Mr. Evans): You have been handed Exhibit A-2, which is a letter dated November 21, 1951 from Mr. O'Reilly to you? A. Yes.

Q. State whether or not that letter was received by you?

A. That letter was received by me, yes.

Q. Upon receipt of that letter, will you state whether [300] or not you took any action towards having Mr. O'Reilly's commission for September and October sent to him?

(Testimony of Lawson P. Turcotte.)

A. Yes. I passed it on to the accounting department and they sent him his checks.

Q. Will you state whether or not the check was sent at your direction?

A. That is correct.

Q. Now, can you tell us why there was a delay in sending the check for his commission for September and October?

A. Well, when the settlement was made with Mr. O'Reilly—

Mr. Short: I object to that and ask that that word be stricken—"settlement".

The Court: The objection is overruled.

A. (Continued) —when the settlement was made with Mr. O'Reilly, I had instructed the treasurer of the company that any checks passed on to Mr. O'Reilly during this six months' period should come through my office.

Mr. Short: I ask that it be stricken as hearsay.

The Court: Denied, and the objection is overruled.

A. (Continued) And the reason that these two checks were late is that I was in Europe during the month of October and the first part of November.

Q. (By Mr. Evans): Now, will you state whether or not at the time you received the letter of November 21st you had any information or any idea that Mr. O'Reilly was claiming anything in excess of the one and one-half percent commission mentioned in that letter?

A. None whatever.

(Testimony of Lawson P. Turcotte.)

The Court: What letter is that now? What date?

Witness: November 21, 1951.

Mr. Evans: Now, will you kindly hand the witness Exhibit A-3, letter dated April 7, 1952?

(Whereupon Defendants' Exhibit A-3 is handed to the witness by the bailiff.)

Q. (By Mr. Evans): Will you state whether or not you received Exhibit A-3, the letter from Mr. O'Reilly dated April 7, 1952? A. Yes.

Q. Now, will you state whether or not in response to that letter you took any steps toward sending Mr. O'Reilly a check for his commissions for February, as per his request? A. Yes.

Q. What, if any, steps did you take?

A. I checked with the treasurer of the company to see if the check had gone forward. If not, it was to be forwarded.

Q. Will you state briefly what was the reason for [302] the delay in his not having received his February commission as late as April 7, 1952?

A. Well, it was the same situation as previously. I was traveling in California and New York.

Q. Now, will you state whether or not at the time you directed that a check be sent to Mr. O'Reilly you had any inkling that he was claiming something in addition to his one and one-half per cent up through the month of February 1952?

Mr. Short: That is leading.

A. None whatever.

The Court: Read the question.

(Testimony of Lawson P. Turcotte.)

(Whereupon the last question is read by the court reporter.)

The Court: Overruled.

A. None whatever.

Q. (By Mr. Evans): Did you—will you state whether or not you relied upon the statements made in Mr. O'Reilly's letter of April 7, 1951 to the effect that this would be his last check?—1952, excuse me.

A. I certainly did.

Mr. Evans: Now, will you kindly hand the witness Exhibit A-4, please?

(Whereupon Defendants' Exhibit A-4 is handed to [303] the witness by the bailiff.)

Q. (By Mr. Evans): Now, Mr. Turcotte, will you state whether or not you sent Mr. O'Reilly the original of the Exhibit A-4, which is a carbon copy?

A. I did.

Q. And will you state what your intention was as expressed by your words in that letter?

Mr. Short: Object to that.

The Court: The objection is sustained.

Q. (By Mr. Evans): Will you state whether or not your intentions at the time of sending that letter——

The Court: (Interposing) I don't think that is proper, Mr. Evans. Ask him another question. You can ask him what he said if you have not already done so, or you can ask him what he said or what somebody else did or said, if the other person is Mr. O'Reilly, but the question you are now in the process of stating is objectionable.

(Testimony of Lawson P. Turcotte.)

Mr. Evans: For the purpose of the record, Your Honor, may I complete the whole question?

The Court: No. You may make an offer of proof.

Mr. Evans: Very well, if I may just very briefly. May it please the Court, what I propose to offer [304] by way of proof is that Mr. Turcotte intended to state exactly what he stated in the letter of April 8, 1952, and that was the purpose of my question.

Mr. Short: Object to the offer of proof.

The Court: Sustained.

Q. (By Mr. Evans): Now, Mr. Turcotte, did you ever again see Mr. O'Reilly around the premises of the Puget Sound Pulp and Timber Company after he left in the first days of September, 1951, for the next—say a year?

A. Never saw him.

Q. Will you state whether or not anything ever came to your attention that he had ever been there during that period? A. No.

Q. Will you state whether or not Mr. O'Reilly had any authority to represent Puget Sound Pulp and Timber Company after he left your offices in the first few days of September 1951?

A. None whatever after September 1, 1951.

Q. Will you state when was the first time you were aware that Mr. O'Reilly was making any claim for any additional compensation?

A. I believe it was the middle of 1953. I am not sure. [305]

Q. Will you state how that came to your attention?

(Testimony of Lawson P. Turcotte.)

A. I received a letter from Mr. O'Reilly.

Mr. Evans: Will you hand the witness Exhibit A-6?

(Whereupon Defendants' Exhibit A-6 is handed to the witness by the bailiff.)

Q. (By Mr. Evans): Will you state whether or not Exhibit A-6, letter dated June 5, 1953, refreshes your memory with regard to when you first heard of Mr. O'Reilly's claim for additional compensation? A. This is the first time.

Q. Now, will you state whether you would have taken any different action than you took had you known in 1951 that Mr. O'Reilly was making a claim for additional compensation?

Mr. Short: Objected to as speculative and argu-
The Court: Overruled. Read the question.

A. Well, I certainly would not have made him any offer of additional commissions from September 1, 1951, to February 29, 1952, if I had known.

Q. You now think you would have taken any other different action had you known during all the time that Mr. O'Reilly was going to make a claim for double his compensation he had received? [306]

A. Would you repeat that?

Mr. Short: Same objection, if the Court please.
It is utterly immaterial.

The Court: Overruled.

Read the question.

(Whereupon the last question is read by the court reporter as follows: "Q. You now think you would have taken any other different action

(Testimony of Lawson P. Turcotte.)

had you known during all the time that Mr. O'Reilly was going to make a claim for double his compensation he had received?")

Witness: I don't quite—would you read that again please?

Mr. Evans: I will rephrase it. Strike that.

Q. (By Mr. Evans): Will you state whether or not you would have taken any different action than you did take had you known all along from January 1949 that Mr. O'Reilly was making claim for double his amount of compensation?

A. Yes, I would have taken different action.

Q. What, if any, action do you now think you would have taken?

A. I would have referred it to our attorneys.

Q. Do you have any other opinion or idea now as to what action you might have taken——

Mr. Short: (Interposing) This is getting [307] extremely speculative.

The Court: Sustained.

Mr. Evans: Now, would you kindly hand the witness Exhibit A-9, please?

(Whereupon Defendants' Exhibit A-9 is handed to the witness by the bailiff.)

Q. (By Mr. Evans): You have been handed what has been marked for identification as Exhibit A-9. Without reading from them into the record or anything, can you tell us what they are?

A. This is a report on paperboard converting presented to me by Mr. O'Reilly for any action

(Testimony of Lawson P. Turcotte.)

that the company might have seen fit to take upon the report.

Q. Will you state whether or not there were other similar reports from time to time you have received from Mr. O'Reilly?

Mr. Short: Objected to as not the best evidence if the Court please.

The Court: Overruled.

A. I think there were probably one or two.

Mr. Short: Excuse me. Do you remember how this matter came up originally? It came up on the cross examination of Mr. O'Reilly. Counsel sought to impeach O'Reilly for having made the statement that while contacting customers he made no reports of [308] those contacts to the Bellingham office. These were then produced and excluded from evidence. Now, they are sought to be identified by this witness which is proper, but now the question to which the objection is made is are there reports other than those. The fact of the report is the impeachment that counsel seeks, not the content, because the content relates to absolutely nothing involved in this litigation.

The Court: The objection is overruled.

* * * * *

A. I received these two, plus probably one or two more. There were not very many reports made.

Q. (By Mr. Evans): Now, can you fix for us the approximate date that you received the two reports which are Exhibit A-9?

(Testimony of Lawson P. Turcotte.)

A. There is no date on them. I got them out of our 1950 file in the office.

The Court: That does not seem to me to answer the question. [309]

Witness: Well, I don't know, Your Honor.

The Court: You just do not know when you got them?

Witness: That is right.

Q. (By Mr. Evans): From the contents, without disclosing the contents, can you fix the approximate date when you received those reports?

Mr. Short: I believe he has answered the question.

The Court: Sustained.

Q. (By Mr. Evans): Will you state where those reports came from? A. From Mr. O'Reilly.

Q. Will you state where they were filed when you first found them?

The Court: Wait just a minute.

Miss Reporter, can you find the witness' statement in response to the Court's question—his answer about getting them out of the file?

(Whereupon the court reporter read from the record as follows: "By Mr. Evans: Q. Now, can you fix for us the approximate date that you received the two reports which are Exhibit A-9? A. There is no date on them. I got them out of our 1950 file in the office.")

The Court: That answers your question, does it not?

(Testimony of Lawson P. Turcotte.)

Mr. Evans: Yes.

Q. (By Mr. Evans): Will you state whether or not those reports reveal any statement of dissatisfaction on the part of Mr. O'Reilly as to how the board division was operated?

Mr. Short: I would object to his further inquiry on a document not in evidence.

The Court: That objection is sustained. You can have it marked, and if it is anything that may properly be received, we could in that way soon find out, and the Court sustains this objection.

Mr. Evans: Very well then. I believe I have laid the proper foundation and I will offer Exhibit A-9.

Mr. Short: It is objected to as completely immaterial, as previously argued.

The Court: May I see it?

On what issue do you offer the Exhibit?

Mr. Evans: If the Court will recall, Mr. O'Reilly admits he prepared those reports, and I am now offering them to show his report as to the operation of the company.

Mr. Short: That gives me no indication of what the ultimate fact that report, its contents, or any circumstance surrounding it establishes in this case.

The Court: The objections are overruled.

Defendants' Exhibit A-9 is now admitted.

(Defendants' Exhibit A-9 received in evidence.)

(Testimony of Lawson P. Turcotte.)

Cross Examination

Q. (By Mr. Short): Mr. Turcotte, did I correctly understand your testimony that your first conversation with Mr. O'Reilly in reference to the termination of his employment was immediately upon your discovery that he was about to operate or contemplated opening a board mill in California?

A. That is correct.

Mr. Short: May the witness be handed Exhibit A-7?

(Whereupon Defendants' Exhibit A-7 is handed to the witness by the bailiff.)

Q. (By Mr. Short): That letter is to yourself, is it not? A. Correct.

Q. From Mr. O'Reilly? A. Yes. [312]

Q. And the date is what?

A. November 24, 1950.

Q. Is it not a fact that in that letter you were advised of his contemplated plan to open a paper-board mill?

A. Well, in that letter he said he might.

Q. Yes. Did you have any notice prior to November 24, 1950, that he might? [313]

* * * * *

A. Yes. About a month previous to that we knew that Mr. O'Reilly had some interest in a machine back East.

Q. (By Mr. Short): That would be in October, 1950, would it? A. Yes.

Q. Your statement on direct examination that the first conversation occurred immediately after

(Testimony of Lawson P. Turcotte.)

your discovery that he was contemplating the board mill in California is not quite correct, is it?

A. Well, that is correct, because although we knew that he might do this and do that, it came to our attention through a Dun & Bradstreet report that he was actively connected with this new company around that time.

Q. Around what time?

A. April or May, in there.

The Court: Of what year? Repeat it so it makes it more convenient to keep track of it.

Witness: 1951. [314]

Q. (By Mr. Short): Well, now, on your direct examination you testified that was in March of 1951. Are you now testifying it was in April or May of 1951?

A. It could have been March, yes.

Q. Do you recall your deposition was taken at the company's plant in Bellingham on March 5, 1954?

A. Yes, sir. [315]

* * * * *

Q. Are you on page 51 now, Mr. Turcotte?

A. Yes.

Q. I am reading from line 7: "Question: You did? Answer: Yes, sir. Question: Now when did you yourself first converse with him during the course of which a separation date was specifically discussed by you and by him? Answer: I would say in the month of July sometime."

Do you recall that answer?

A. Yes.

(Testimony of Lawson P. Turcotte.)

Q. (Reading) "Question: Of what year? Answer: 1951."

Was that your answer? A. Yes.

Q. Do you now have any specific recollection of what the date of that conversation was? [316]

A. Well, this is the official conversation I had with Mr. O'Reilly after receiving his letter. I had had two or three conversations with him before that.

Q. You appreciate that that question was: "Now when did you yourself first converse with him * * * ." Do you see that question on line 9 of page 51?

A. Well, this answer would be wrong then.

Q. The answer in the deposition would be wrong?

A. That is correct, unless I misunderstood the question and thought that they were talking about the official conversation I had with him after his letter of July 12th.

The Court: Well, look at the surroundings sufficiently to see if anything occurs to you by which you were allowed to be not fully aware of the relationships so that you can let the Court now know for sure and finally which is the fact that is under inquiry as to the detail that is under inquiry, if you can. Any of us may be mistaken, of course, at any moment of our reflection on past events, but see if you cannot straighten it out.

Witness: Well, I think, Your Honor, on the top

(Testimony of Lawson P. Turcotte.)

of page 51 I probably misinterpreted the question. It said:

“Well, did you ever have any conversations with Mr. O'Reilly in 1951 with regard to a separation date, [317] as to when he was to leave the Company, or leave his employment with the Puget Company?”

Mr. Short: What page are you on?

Witness: At the bottom of page 50.

My answer was: “Yes. We had a conversation with him as to separation date and settlement. Not a separation date alone.”

Now, the answer to that was the only time we discussed separation date and settlement, was after the July 12 letter. Previous to that, we had only discussed separation date, and I probably——

The Court: (Interposing) Could a discussion on separation date have occurred as early as you there say on page 51 of your deposition?

Witness: It was before that.

Q. (By Mr. Short): Before July of '51?

A. Before July of '51, yes.

Q. Mr. O'Reilly—excuse me—Mr. Turcotte, the next succeeding question after the one you just read: Question: I am asking you first whether you had any conversation with him with reference to a separation date? Answer: We did,—I did.”

Is that correct? [318] A. Yes, yes.

Q. (Reading) “Question: You did. Answer: Yes, sir. Question: Now when did you yourself first converse with him during the course of which

(Testimony of Lawson P. Turcotte.)

a separation date was specifically discussed by you and by him? Answer: I would say in the month of July sometime."

Is that right? A. That is right.

Q. (Reading) "Question: Of what year?"

A. The answer is wrong.

Q. Very well. If I understand your testimony on direct examination correctly, in the conversation that you did have with Mr. O'Reilly you stated that you pointed out to him how much money had been paid him in commissions up until that time, is that correct? A. Yes.

The Court: What dates are you referring to, for my convenience, Mr. Short? What date is this you are referring to in the last question?

Mr. Short: The new correct date of—what is it, April of 1951?

Witness: No. I didn't understand the question that way, no. The amounts of commissions were talked about with Mr. O'Reilly in the latter part of July meeting. [319]

Mr. Short: I think I can clarify this.

The Court: Go ahead.

Q. (By Mr. Short): The conversation which you related on your direct examination in which you outlined to Mr. O'Reilly how much commissions he had drawn, that conversation took place shortly after July 12, 1951, is that correct? A. Yes.

The Court: May I interrupt you?

After July 12, when did you next talk with him about termination?

(Testimony of Lawson P. Turcotte.)

Witness: Well, I don't know the exact date, Your Honor. It would probably be around the 20th or 25th, in there, the latter part of July 1951.

The Court: All right. Now, after that, when again did you talk with him about termination of his connections with the company?

Witness: Never.

The Court: There was one time in your direct examination a little while ago when you, I thought, referred to some consideration that you gave in a conversation with him to his communication of a November date, and I failed to make note at the time of the date of that communication to which you then referred. Do you think of any letter that you [320] had from him or that your company had from him which you considered, which letter had a November date, and had a "1" in either the date of the month or the date of the year in it? I invite your attention to all the defendants' exhibits.

Let him have all the defendants' exhibits.

(Whereupon all of the defendants' exhibits are handed to the witness by the bailiff.)

Witness: Well, Your Honor, there was one date in November in which he asked for his commission checks.

The Court: What date in November, if you recall the date.

Witness: Well, it is November 1951, in which he asked for his commission checks.

The Court: Do you think the year would be 1951?

(Testimony of Lawson P. Turcotte.)

Mr. Short: That would be Exhibit A-2, if the Court please.

Witness: It is November 21.

The Court: Was that November 21, 1951?

Witness: Yes, sir.

The Court: What exhibit number is that?

Witness: A-2, Your Honor.

The Court: Now, Mr. Short, you may resume the examination. [321]

Q. (By Mr. Short): Mr. Turcotte, referring you now to your conversation that you testified to on direct that occurred shortly after the letter of July 12, 1951, which you received from Mr. O'Reilly, when you pointed out to him the total amount of commissions he had been paid by the company, what was the amount of that figure?

A. Something around \$90,000.00.

Q. You then later made a reference that you had therefore paid some \$180,000.00 over the four and one-half years approximately? A. Yes.

Q. Where was the other \$90,000.00 that you had reference to?

A. That was the \$130,000.00 that we paid him for his stock over and above his investment of \$50,000.00.

Q. You mean \$85,000.00 over and above?

A. Yes, plus his commissions.

Q. And you indicated to him—I think you testified—that he was therefore receiving more than the president of the company?

A. Well, I made it facetiously, yes.

(Testimony of Lawson P. Turcotte.)

Q. At that time who was president of the company? A. I was.

Q. On January 1, 1949, who was the president of the [322] company?

A. Mr. Fred G. Stevenot of San Francisco.

Q. During the calendar year of 1948, can you now state whether or not Mr. O'Reilly made more money on his three percent commission basis than Mr. Stevenot had in that same year?

Mr. Evans: Objected to as being immaterial and irrelevant, Your Honor.

The Court: The objection is overruled. There has been something said about more money in commissions paid to Mr. O'Reilly than the president's salary I think somewhere in the case. The objection is overruled.

Q. (By Mr. Short): Can you answer that?

A. I don't think I said just——

The Court: Just answer the question.

Q. (By Mr. Short): Can you state whether or not in 1948 Mr. O'Reilly was paid more in commissions than the remuneration paid to the then president of Puget Sound Pulp and Timber?

A. In commissions?

Q. Yes.

A. I don't know what his commissions were in '48.

Q. If I were to advise you that his commissions for [323] 1948 were \$31,564.62, would you then be able to answer the question?

(Testimony of Lawson P. Turcotte.)

A. It would be very close to it, if not—just in that neighborhood, yes.

Q. Well, do you know? Do you now know what the salary of the president of Puget Sound Pulp and Timber Company in 1948 was?

A. I could get it, but I believe it was around \$30,000.00.

The Court: What was that president's name?

Witness: Stevenot, S-t-e-v-e-n-o-t.

The Court: What is the history of this company? Is there any Canadian or Quebec capital in it?

Witness: No. It is all American capital.

The Court: Where was the company first formed?

Witness: It is all Pacific Northwest capital.

The Court: Was there some particular training that you had had previous to becoming connected with the company that recommended you to the pulp and paper industry?

Witness: Well, to explain that, Your Honor, I started out as a male stenographer, and I have been there for thirty years.

The Court: Where?

Witness: The pulp mill here. [324]

The Court: Where?

Witness: Here.

The Court: But you were with the timber industry before that you said—in accounting.

Witness: Yes.

(Testimony of Lawson P. Turcotte.)

The Court: Was any of that in the Canadian West or Northwest?

Witness: In the Canadian West?

The Court: In Vancouver Island?

Witness: No, it was in Alberta.

The Court: You may inquire.

Q. (By Mr. Short): Mr. Turcotte, you made reference in your direct examination to the fact that in a conversation with Mr. O'Reilly the five year period of his contract was under discussion. Do you have in your hand Exhibit 1? A. Yes, sir.

Q. Are you a signer of that exhibit?

A. Yes.

Q. Will you make reference to paragraph (8) of that Plaintiff's Exhibit 1? Does that paragraph make reference to the five year term?

A. Yes.

Q. And that five year term commences with what date? Would you read paragraph (8) aloud?

A. (Reading) "Bellingham Paper Products Company, when organized, shall enter into a five-year agency agreement with second party (the agency to run from the beginning of manufacture in said mill) * * * ."

Q. All right. Then the five year term to which you had reference commenced with the production in the board mill, did it not? A. Yes.

Q. And that date do you now recall?

A. May 1947.

Q. So that the five year term referred to would expire in May 1952, would it not? A. Right.

(Testimony of Lawson P. Turcotte.)

Q. Mr. Turcotte, if I understand the situation correctly, although you participated in the termination of Mr. O'Reilly's employment with the Puget Sound Pulp and Timber Company, you did not participate in any discussion in reference to his reduction of commissions from three to one and one-half percent? A. That is right.

Q. That was with Mr. Roberg, was it not?

A. That is right.

Q. However, you were at all times in attendance and an executive officer of the mill in 1948 and 1949 and ever since that date, have you not? [326]

A. That is right, yes.

Q. During 1949, did Mr. O'Reilly have any different or other or lesser duties in 1949 and subsequent thereto than he had had in 1948 and the portion of 1947 during which the board mill was in production? A. No.

The Court: Will you state, if you know, what the company did, if anything, it would not otherwise have done but for Mr. O'Reilly's voluntarily reducing the amount of his commission?

Witness: I don't think, Your Honor, it would have done anything differently excepting that at that time, after the Bellingham Paper Products was dissolved, we tried to give the paperboard plant more help from the operators of the mill.

The Court: Did that cost the defendant company anything? Plant working time?

Witness: Plant work time, yes. No, I don't think—well, I couldn't tell you what we would have

(Testimony of Lawson P. Turcotte.)

done had Mr. O'Reilly not voluntarily reduced his commission. It is a hard thing to——

The Court: Did you know of any business problems that were arising in that part of the business which related to paperboard and the paperboard division?

Witness: Oh, yes. I was entirely familiar with the operation. [327]

The Court: Describe what you knew to be the difficulties that were confronting that phase of the business that you think contributed to the result of Mr. O'Reilly's voluntarily reducing his commission to one and one-half percent?

Witness: Well, it was a question of the monthly financial results of the company which were not favorable.

The Court: It was not making enough profit?

Witness: It was not making any, and Mr. O'Reilly admitted that and voluntarily reduced his commissions.

Q. (By Mr. Short): Well, that is a hearsay statement by you. He didn't say that to you, did he?

A. Well, he didn't say that to me, no. I think it is in writing.

The Court: If you offer it as an objection, the objection will be overruled. I think he is president of the company and has a right to know what other persons subordinate in authority to him knew regarding the affairs of the company if such affairs

(Testimony of Lawson P. Turcotte.)

came under his jurisdiction when he was the superior corporate officer of Mr. O'Reilly.

Did you wish to ask him any further questions?

Mr. Short: Yes, I did.

Q. (By Mr. Short): Mr. Turcotte, you have just testified that in 1948 the paperboard division was losing money, is that correct? A. Yes.

Q. At that time, that is during the entire calendar year of 1948, the pulp company was billing out—that is as an accounting procedure—billing out pulp to that division, to the paperboard division, at its average sales price to other customers outside the company, was it not?

A. I think that is right. [329]

* * * * *

Q. At any time was it ever the practice as to any division other than the paperboard division to bill out any item at a figure greater than its cost to the company?

* * * * *

A. Answering that question, in the alcohol division we wouldn't know what to charge for its raw material because it is waste liquor that was formerly dumped in the Bay. We charge them for steam, labor, and everything else, but the raw material itself. It formerly went down the sewer, so we don't know what value it had.

On the lignisite division, that is a by-product after the sugars are taken out for alcohol. That is just another waste that we wouldn't know just what to charge or credit the alcohol plant. It is just run

(Testimony of Lawson P. Turcotte.)

through the alcohol plant and then it is run through the lignisite division, and we charge them for steam, electric power, labor, [331] depreciation, and a portion of the overhead.

Q. That is purely for the purpose of arriving at a profit and loss statement for each of those divisions, is it not? Otherwise, there would be no purpose in arriving at any figure?

A. That is right.

Q. Was there any particular purpose in charging the paperboard division any amount more than the cost?

A. Absolutely. That was the way we would learn whether we would make a profit on the board division or not having it and selling the pulp.

Q. Yes. In other words, that would indicate to you whether it would be better to sell that pulp to an outside customer at that average price rather than to make paperboard with it and sell the finished product? A. Yes.

Q. Do you know now whether you now so bill pulp to that division.

A. Not now, because it is all in one company now.

Q. It was all in one company in 1948.

A. But we do make computations every month separately to see how it is doing, based on as if we sold the pulp in the outside market. Those computations are made every month.

Q. And that is simply an internal accounting

(Testimony of Lawson P. Turcotte.)

system to keep you advised as to whether or not it is profitable to [332] maintain that division?

A. That is correct.

Q. Or to sell the pulp elsewhere?

A. That is correct.

Q. Mr. Turcotte, when you were in the habit in 1948 of billing to the division of pulp at average market, the fact that that resulted in a loss in that division did not necessarily mean you were losing money from the operation of that division but that it may mean you were making less money than had you sold the pulp directly, is that correct?

A. That is correct, yes.

Q. So it really makes no difference to the net profit of Puget Sound Pulp and Timber Company which way you bill it out, does it?

A. It certainly does.

Q. No. It makes a difference whether you are operating the board mill, but it makes no difference to the net profit of the company whether you use the one accounting system or the other?

A. Not presently, no.

Q. And it made no difference to the sales volume of that division which accounting system you used?

A. Not a bit.

Q. Now, you have Exhibit 1, do you, in your hand? May I refer you to paragraph (2)? Excuse me. In reference to [333] paragraph (8), the commissions paragraph which you previously read, the profit position under each or either of the accounting methods you have just described is unrelated

(Testimony of Lawson P. Turcotte.)

to that, the commission which Mr. O'Reilly would receive?

A. It is unrelated as to the amount of commission he would receive. That is right.

Q. One other matter. Can you tell the Court now whether or not in the period between mid-September 1951 and up to March 1, 1952, whether the sales of the paperboard division increased or decreased, do you know?

A. No, I don't know.

Q. Can you state whether or not in 1951, during a portion of which year I understand you have stated that Mr. O'Reilly was gone, did the sales of the paperboard division increase or decrease over the previous year of 1950?

A. Well, the answer to that would be that I think we ran the plant pretty full all through that period.

Q. Your answer would be that it increased?

A. About the same. [334]

* * * * *

Further Direct Examination

Q. (By Mr. Evans): Mr. Turcotte, will you state whether or not you were aware that Mr. O'Reilly was going back to Ottawa, Canada, for the purpose of buying a new machine?

A. No, I was not.

Q. Will you state whether or not such trip was authorized by your or any other officer to your knowledge? A. It was not.

(Testimony of Lawson P. Turcotte.)

Q. Do you know whether or not the company paid for his trip?

A. I believe we did. [335]

* * * * *

RUSSELL deLOPEZ

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Evans): Where are you presently employed?

A. Puget Sound Pulp and Timber Company, Bellingham, Washington. [337]

Q. In what capacity?

A. Traffic manager and assistant to the vice president.

Q. Will you state what are the nature of your duties?

A. As assistant to the vice president, I have charge of the sales division and seeing that it functions properly in relation to all of the invoicing, order execution, and related matters.

In relation to traffic work, I process new rates, take care of routing, ship bookings, and all related matters.

* * * * *

Q. Now, will you state whether or not at any time you have performed the duties of sales manager for the board division of the Puget Sound Pulp and Timber Company?

(Testimony of Russell deLopez.)

A. Yes, from September 1, 1951, until January 1, 1954.

Q. Will you state whether or not you recall the date that Mr. O'Reilly left Puget Sound Pulp and Timber Company?

A. It was either September 4 or 5, 1951.

Q. Will you state whether or not you were with him a substantial portion of his last day?

A. I was. [338]

Q. What was he doing during that time?

A. He was bundling up files and packing them in boxes, and after he got through with that he and I sat down and had a long conversation about all of the accounts of the paperboard division, starting with the Canadian border and going clear down to California. I made voluminous notes of all the things he told me, and I made a written report to Mr. Turcotte and Mr. Roberg.

Q. What was the purpose of that conversation?

A. He give me a brief resume of what the situation was in the paperboard division so I could take over the work.

Q. Now, will you state whether or not at any time thereafter for the next year you ever again saw Mr. O'Reilly around the premises of the Puget Sound Pulp and Timber Company?

A. Not to my recollection.

Q. Will you state whether or not you communicated with him during the next year at any time?

A. I think on one occasion I had reason to telephone him at Richmond, California, and ask him a

(Testimony of Russell deLopez.)

question, and to the best of my knowledge that is the only time that I had any communication with him in relation to company business.

* * * * * [339]

Q. Will you state whether or not, after Mr. O'Reilly left, you communicated with the customers of Puget Sound with regard to their needs?

Mr. Short: That will be objected to as immaterial, what this witness did.

The Court: The objection is overruled.

A. I did. I talked to them by telephone and I wrote them letters.

Q. Will you state whether or not, after Mr. O'Reilly departed, you serviced the accounts of the board division of the Puget Sound Pulp and Timber Company?

A. I most certainly did.

Q. Will you state whether or not the California Paperboard Company was a competitor of the board division of the Puget Sound Pulp and Timber Company?

Mr. Short: I object to the qualification of [340] this witness and the relevance and materiality of the question and that it calls for a conclusion.

The Court: Overruled.

A. They were in direct competition with us in certain grades.

Q. Will you state whether or not there was any occasion which arose where it was contemplated that it might be necessary to close down the board division of Puget Sound Pulp and Timber Com-

(Testimony of Russell deLopez.)

pany during the period September 1, 1951, through the month of February 1952?

A. Yes. The order situation got very drastic along in January 1952, and if we had not been able to close a 550 ton order for South Africa, I feel sure we would have had to close the mill for a period.

Q. Will you state who procured the order from South Africa?

A. Mr. Roberg negotiated it, and so did I.

Q. Will you state whether or not Mr. O'Reilly had any part in that order?

A. He didn't know anything about it.

Mr. Short: Objected to as not responsive.

The Court: That is sustained.

Mr. Short: And move it be stricken.

The Court: The Court will disregard the answer.

* * * * * [341]

A. None whatever.

The Court: How many ton order?

Witness: 550. That is almost half the production of the mill for one month, and February was a short month.

* * * * *

Cross Examination

Q. (By Mr. Short): You have been here through the trial, Mr. deLopez? A. Yes.

Q. You have heard the testimony in reference to what has been called an evergreen contract?

A. Yes, I have.

Q. You are acquainted with those as used by the Puget Sound Pulp and Timber Company?

(Testimony of Russell deLopez.)

A. I never heard the expression until today.

Q. Do you know of such contracts?

A. No, I do not.

Q. Do you know whether or not when you assumed your duties with the board division that there were such contracts in your files?

A. There was one contract to my recollection, but I haven't been able to find it. That was the only one that was signed.

Q. Whether or not there were any such signed contracts, were there such arrangements with the customers of Puget Sound Pulp and Timber paper-board division?

Mr. Evans: I am going to object to this line of questioning, Your Honor, as not being within the scope of the direct, and I believe it is a legal matter. "Arrangements" cover a multitude of sins, and we all know only a signed contract is binding.

The Court: What is there about the direct examination which inspires this?

Mr. Short: Well, he was asked on his direct examination if on September 1, 1951, he handled the sales for that division, and this question is designed to show that the sales are repeated by the customer under the evergreen system put in operation by Mr. O'Reilly.

The Court: The objection is overruled. [343]

Read the question.

(Whereupon the last question is read by the court reporter as follows: "Q. Whether or not there were any such signed contracts, were

(Testimony of Russell deLopez.)

there such arrangements with the customers of Puget Sound Pulp and Timber paperboard division?")

A. I don't know whether there were are not.

Q. (By Mr. Short): In the latter part of 1951, from September on, what customers of Puget Sound Pulp and Timber board division did you service, as you call it?

A. Well, all of them. There was nobody else to do it.

The Court: How long have you been with the company, Mr. deLopez?

Witness: Since 1929.

The Court: In what various capacities?

Witness: I started out as secretary to the president of the company in 1929, and that was down in Everett, and I was transferred to Bellingham March 14, 1934, and I became assistant traffic manager of the company in 1937. I was in that capacity until 1942 when I became traffic manager. All that time I have been closely associated with Mr. Roberg in sales work.

* * * * * [344]

Q. If I understand your testimony, you indicated that you became sales manager in September 1951, is that correct?

A. Those were my duties.

Q. Of the board division?

A. Those were my duties.

Q. Was there another manager, other than a sales manager of that division?

(Testimony of Russell deLopez.)

A. No, there was not.

Q. Well, who ran the operation of the machines in the mill?

A. The plant superintendent.

* * * * * [345]

Q. You wouldn't know then how to figure grades or other technical matters for the operation?

A. I learned it as I went along.

Q. When did you become acquainted with that?

A. During those first few months. I am still not a production man. That wasn't part of my duty.

Q. You referred, Mr. deLopez, to a competitor, a company being a direct competitor of Puget Sound Pulp and Timber paperboard division. What is the name of that company you had reference to?

A. At that time California Paperboard Company.

Q. And is that the company that the testimony has concerned itself with as being the company Mr. O'Reilly founded in Richmond, California?

A. That is correct.

Q. When did that company become a competitor of Puget Sound Pulp and Timber Company?

A. To the best of my recollection some time in 1952.

Q. It wasn't in production until that time, was it?

A. I don't know the date they started production.

* * * * * [346]

(Testimony of Russell deLopez.)

Redirect Examination

Q. (By Mr. Evans): Mr. deLopez, will you state whether or not you advised the customers of Puget Sound that Mr. O'Reilly was no longer working for them? A. I did.

Q. And in particular, will you state whether or not you advised the Laminated Paper Products Company of such fact after September 1, 1951?

A. I did.

Mr. Short: That is objected to as self-serving, if the Court please.

The Court: That objection is overruled.

* * * * * [347]

Q. Will you state whether or not your plant superintendent of the board division was an experienced man or an inexperienced man?

A. Very experienced.

Q. Will you state whether or not, so far as having a man to run the plant is concerned, you were in any way handicapped by Mr. O'Reilly's leaving?

A. None whatever.

* * * * *

Q. Will you state whether or not you advised the people at the Salinas Wax Paper Company shortly after September 1, 1951, that Mr. O'Reilly was no longer connected with your company?

A. I did.

* * * * *

Recross Examination

Q. (By Mr. Short): How did you advise these people?

(Testimony of Russell deLopez.)

A. I don't recall whether it was by letter or by telephone, perhaps both.

Q. Have you examined your files to determine whether it was by letter or by phone? [348]

A. I have examined some of the files and some indicate there are letters.

* * * * *

Q. (By Mr. Short): You indicated that in reference to this 550 ton order that had it not been for that it would be likely you or some one would close the board mill. Isn't it a fact that at approximately the time that order was acquired that another customer of Puget Sound Pulp and Timber paperboard division, namely, the Gympsum, Lime and Alabastine Company, had ceased or diminished its orders to the paperboard division?

A. Not at that time, I don't believe.

Q. They customarily used approximately 450 tons a month, did they not?

A. I believe that was correct.

Q. And in the early part of 1952 or the latter part of 1951 they quit ordering at that rate, did they not?

A. I have not definite recollection, but you may be right. [349]

Q. Well, to what do you attribute the necessity of that one large order to keep that mill in operation at that particular time?

A. Well, if you are correct, the Gympsum, Lime and Alabastine quit ordering from us at the rate of

(Testimony of Russell deLopez.)

450 tons a month, and we had to find another customer to take its place.

Q. That would be a serious blow?

A. Yes, it would.

Q. Do you know whether or not the business of the Gypsum, Lime and Alabastine Company fell off markedly at that time?

A. I can't recall the exact time now, but I know there was one time when they were badly handicapped by a building strike in Canada.

Q. With reference to that customer that I just referred to, were sales commissions paid to any person for those Canadian shipments?

A. Well, Mr. O'Reilly collected commissions.

Q. No. I meant any other person outside of Puget Sound Pulp and Timber.

A. Oh, no. [350]

* * * * *

Further Redirect Examination

Q. (By Mr. Evans): Mr. deLopez, you are being handed what has been marked for identification as Defendants' Exhibit A-14. Will you state whether or not you can identify it without revealing what it is? A. Yes, I can.

Q. Will you state whether or not it is a copy of a letter which you transmitted in the regular and usual course of your business? A. It is.

Q. Will you state whether or not that came out of your files and records kept in the regular and usual course of business? A. It did.

Q. Will you state whether or not it is a perma-

(Testimony of Russell deLopez.)

nent record of your company with the Laminated Paper Products Company, a permanent record of your correspondence with them? [351]

A. It is.

Mr. Evans: I offer Exhibit A-14.

Mr. Short: No objection.

The Court: Admitted.

* * * * *

Further Recross Examination

Q. (By Mr. Short): That is the only one you can find, is that correct?

A. There were many letters like that, not to that particular company but to many companies.

Q. How did you happen to bring that one?

A. Because I heard the testimony this morning that Mr. Frankl of Laminated Paper Products said he did business only with Mr. O'Reilly, and he couldn't have because I was handling the work at the mill. [352]

* * * * *

CLAYTON E. ROGERS

called as a witness by and on behalf of defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * * *

Q. (By Mr. Evans): By whom are you employed?

A. Puget Sound Pulp and Timber Company.

Q. In what capacity?

A. Treasurer.

(Testimony of Clayton E. Rogers.)

Q. How long have you been employed in that capacity? A. Since April of 1953.

Q. What was your position prior to that time?

A. Chief accountant.

Q. For whom?

A. Puget Sound Pulp and Timber Company.

Q. How long have you been with the Puget Sound Pulp and Timber Company?

A. Since May 1, 1943. [353]

Q. Will you state whether or not you were acquainted with the plaintiff, Mr. Joe O'Reilly?

A. Yes, I was.

Q. Will you state whether or not at any time Mr. O'Reilly advised you of any agreement he had made to reduce his sales commission?

* * * * *

A. Yes.

Q. (By Mr. Evans): Will you state to the best of your recollection about when that conversation took place?

A. It would be a few days subsequent to the memorandum that I received in the official channels from Mr. Roberg. That memorandum is dated January 28, 1949.

Q. Do you recall where your conversation with Mr. O'Reilly took place?

A. It was either in his office or my office.

Q. Where was his office? [354]

A. On the second floor of the executive office building of the Puget Sound Pulp and Timber Company.

(Testimony of Clayton E. Rogers.)

Q. Will you state whether or not any other persons occupy that whole building other than Puget Sound's force or staff?

A. No, just Puget Sound staff.

Q. Now, will you state whether or not anyone else was present during this conversation?

A. Not to my recollection.

Q. Will you advise us what Mr. O'Reilly told you as to his agreement with regards to reduction of the sales commission?

A. He confirmed that the reduction of sales commission to one and one-half percent, as I had been notified by Mr. Roberg, was correct.

Q. Now, will you state whether or not at any time you heard from any source that Mr. O'Reilly in fact claimed he was entitled to an additional one and one-half percent? A. No.

Q. Now, will you state whether or not you recall about the time Mr. O'Reilly left Puget Sound Pulp and Timber Company?

A. About September 1st.

Q. Of what year? A. 1951. [355]

Q. Will you state whether or not you ever again saw him about the premises—say for the next year?

A. I do not recall seeing him there within the year.

Q. Will you state whether or not you ever received any communications from him between September 1, 1951, and the last day of February, 1952?

A. Yes, sir. I received a letter from him in

(Testimony of Clayton E. Rogers.)

response to a letter relative to some credit that I had written him shortly after September 1st.

Q. Did you have any communications with him in regard to anything other than payments or credits of moneys due? A. No, sir.

Q. Will you state whether or not you had any communications with him with regards to any work he might be doing for Puget Sound?

A. No, sir.

* * * * *

Q. (By Mr. Evans): You have been handed what has been admitted in evidence for a limited purpose as Exhibit A-10. Will you state whether or not you can identify it?

A. Yes, I can. [356]

Q. Will you state what it is?

A. It is a memorandum dated January 28, 1949, and addressed to me with notification from Mr. Roberg that in accordance with an agreement with Mr. O'Reilly the commissions for the sales in the board division were being reduced to one and one-half percent from three percent.

Q. Will you state whether or not that memorandum was received by you in the regular and usual course of business of the Puget Sound Pulp and Timber Company? A. Yes. [357]

* * * * *

JOE A. O'REILLY

called as a rebuttal witness on his own behalf, having been previously sworn, was examined and testified as follows:

(Testimony of Joe A. O'Reilly.)

Direct Examination

Q. (By Mr. Short): Mr. O'Reilly, are you acquainted with the customer of Puget Sound Pulp and Timber Company known as Gypsum, Lime and Alabastine Company? A. Yes, I am.

Q. Where is that concern located?

A. The main office is in Vancouver, British Columbia, and the plant in this area is New Westminster, British Columbia. I should say the Western office. The main office I think is in the Eastern part of Canada.

Q. What is their purpose? What do they produce?

A. They produce gypsum wallboard, which is lined with paperboard.

The Court: You mean the outside is covered with paperboard?

Witness: Yes.

Q. (By Mr. Short): During your tenure at Puget Sound Pulp and Timber Company, what did they purchase from that company? What [358] did they buy?

A. They bought the paper board that they use as the exterior liner of the gypsum wallboard.

Q. Up until mid-1951, what was the average tonnage shipped to this company?

A. Up until that time, as I recall it, it was approximately 300 tons a month, but they were asking for an increase of another 150, which would put them up to 450 tons per month.

* * * * *

(Testimony of Joe A. O'Reilly.)

Q. Do I understand that they had applied to Puget Sound Pulp and Timber for an increase of 150 tons a month?

A. They had been asking it over a period of months previous.

Q. All right. Now, did you have any contact with that company during a period subsequent to September 1, 1951?

A. I called there one time as I recall it.

Q. Do you recall when that would be? [359]

A. I am not certain of the date.

Q. Are you acquainted with the condition of their ordering from Puget Sound Pulp and Timber at the beginning of 1952?

A. I heard that their business had dropped off because of a building strike in that area and they couldn't take the tonnage that they had anticipated they would need. The result was that their orders dropped off for the paperboard division of the pulp mill.

Q. Do you have a recollection as to when that was?

A. I think it was in the first month or two of 1952. It could have started in the latter part of 1951. I am not certain.

Q. Did you ever have any contact with that company later in 1952 than February 29? A. No.

Q. Was there any time during your employment at Puget Sound Pulp and Timber Company in which the board mill was threatened with closure because of lack of orders?

(Testimony of Joe A. O'Reilly.)

A. There was a period I think in the early part of 1950 when business was not too brisk, and we tried an operation of five day weeks for, as I recall it, a two week period, but it didn't—in other words, the five day operation would eliminate certain overtime charges, and we thought that possibly by eliminating that we might have a [360] better profit for the five days than if we paid the extra charges and went the seven days, but it developed that that wasn't satisfactory, so we went back to seven days, which continued thereafter through all of the time that I was with them.

Q. How many hours a day does the mill operate? A. Twenty-four hours a day.

Q. Seven days a week?

A. Seven days a week.

Q. You heard the testimony of Mr. Turcotte?

A. Yes, I did.

Q. And you heard him relate the conversation between you and him in the latter part of July, 1951, did you not? A. Yes. [361]

* * * * *

Q. (By Mr. Short): State whether or not you had any conversation with Mr. Turcotte in the latter part of July 1951 as to your remuneration for the period you had worked in the board mill?

A. The rate of commissions was not mentioned during that period—that conversation I mean.

Q. Was there any conversation between you and Mr. [363] Turcotte as to the fact, if it was a fact,

(Testimony of Joe A. O'Reilly.)

that you had been paid up to that point some \$90,000.00 in commissions?

A. I don't recall that summary that Mr. Turcotte referred to.

Q. Was there any conversation reviewing the sale by you and the purchase from you by Puget Sound Pulp and Timber of your stock in Bellingham Paper Products Company?

A. I don't recall Mr. Turcotte mentioning that.

Q. Was there any conversation between Mr. Turcotte and yourself on that occasion in which you expressed to him your feeling that you had not been fairly treated?

A. Yes. I think that Mr. Turcotte's testimony supports that.

Q. Are you saying that Mr. Turcotte's testimony is correct insofar as it stated that there was a conversation as to whether or not you had been fairly treated?

Mr. Evans: Objected to as being leading.

The Court: That is sustained.

Q. (By Mr. Short): Will you relate then what conversation was had at that time in respect to the matter of your having been treated fairly or unfairly at that time? What was said by you and what was said by Mr. Turcotte?

A. I said several times to Mr. Turcotte that I felt that the separation on the basis that he prepared was not [364] being fair to me, and he said that he felt that it was.

Q. Separation as to what phase, what matter?

(Testimony of Joe A. O'Reilly.)

A. The termination date of February 29, 1952.

Q. And what date was his suggestion at the time you made this statement that it was unfair?

Mr. Evans: I am going to have to object again. He is going far beyond the rebuttal he said he was going to make. Now, Mr. O'Reilly has had an opportunity on direct examination to state what his conversations were. Now he is going back in and rehashing them all over again.

The Court: I am inclined to think so. The objection is sustained.

Q. (By Mr. Short): Well, will you state now whether at any time while the matter of your termination at Puget Sound Pulp and Timber Company was under discussion you made any agreement with Mr. Turcotte or any other officer of Puget Sound Pulp and Timber Company as to any other subject than the termination date of your services with the company?

Mr. Evans: Objected to as being part of the case in chief.

The Court: That objection is overruled.

A. I had no other conversation or subject of conversation other than the termination date with Mr. Turcotte or [365] any other officer of the company.

* * * * *

Cross Examination

Q. (By Mr. Evans): Do you have before you Exhibit A-2? A. Yes, I have.

(Testimony of Joe A. O'Reilly.)

Q. That is a letter written by you to Mr. Turcotte dated November 21, 1951?

A. It is two-thirds of a letter of that date.

Q. Will you read the second paragraph of that letter?

Mr. Short: I object to the reading as improper redirect examination. He has read it once before and has been examined thoroughly on it.

Mr. Evans: It is preparatory for the next question, Your Honor.

The Court: Read the exhibit silently.

Witness: (Peruses Defendants' Exhibit A-2.)

Q. (By Mr. Evans): Now, you have just testified that you did not at [366] any time agree with Mr. Turcotte or any other officer as to your compensation, isn't that correct, until your termination date?

A. Possibly I misunderstood the question. This one and one-half percent has been under discussion and recognized by everyone all the time. I meant anything other than that. That was the purpose of my answer, not to deny the figure of one and one-half percent.

Q. Well, then, you did, when you discussed with Mr. Turcotte the date of your termination, discuss your percentage rate of one and one-half, isn't that correct?

A. Yes.

Q. So that what you just testified to here, that you did not discuss your percentage rate with Mr. Turcotte, is not true, is it?

A. I will explain that.

(Testimony of Joe A. O'Reilly.)

Q. Answer my question yes or no.

A. It is true with the qualification that I have already given you.

Q. It is true with the exception that it is not true, is that what you mean?

Mr. Short: I object to the form of the question.

The Court: That is argumentative. The objection is sustained. [367]

Q. (By Mr. Evans): Well, then, you now admit that you did discuss with Mr. Turcotte the fact that your percentage was to be one and one-half until your termination date?

A. Not in that manner.

Q. Then will you please explain why you wrote the letter of November 21 where you stated, as I recall: "Our agreement of one and one-half percent commission on board mill sales will be paid to me for six months starting September 1st"?

Mr. Short: I will object to the question as too wide.

The Court: Overruled.

A. That was a continuation rather than a starting point. It has been agreed and recognized by everyone concerned with it. I had no intention of denying this figure at any time.

Q. In other words, this confirms your agreement that you made with Mr. Turcotte that you were to receive one and one-half percent for an additional six months after September 1st, isn't that correct?

A. That is what we were talking about. [368]

* * * * *

(Testimony of Joe A. O'Reilly.)

Q. (By Mr. Evans): As I understand, on your rebuttal testimony you testified that you made a trip up to some place in Canada and you saw the Gypsum, Lime and Alabastine Company and that was between the period of September 1, 1951, and February 29, 1952, is that correct?

A. That is correct.

Q. And during that time you found out from talking with them that their orders were going to be substantially diminished, is that correct?

A. It was a threat at the time I talked to them, which later developed.

Q. Who paid for your trip up there?

A. I did. [369]

* * * * *

Q. But starting with January 1, 1949, from then on you had an expense account every month, didn't you?

A. Presumably so. There were items that I paid for at various times that weren't turned in.

Q. Now, when you discovered this information about the Gypsum, Lime and Alabastine troubles, perhaps they were going to cut out their orders, you made no report to Puget Sound about that, did you?

A. Puget Sound was aware of it through their conversations with the mill superintendent.

Q. In other words then, your trip up there to see that company was actually of no value to Puget Sound, was it?

A. It didn't result in any value to them.

(Testimony of Joe A. O'Reilly.)

Q. You didn't make any report of it so that they were aware of what you had done, that you had been there, what [370] information you found out?

A. As I stated, they were already aware of it.

Q. But you didn't make any report of it?

A. No, I did not.

Q. As I understand, it is your testimony here that all this time you were working for Puget Sound?

A. I didn't say that; I said a portion of the time.

Q. In other words, you were not doing any work for Puget Sound after September 1, were you?

A. I have already answered that question several times.

Mr. Evans: I ask that the witness be directed to answer the question.

The Court: Answer it again.

A. I was doing some work for them.

Q. Very limited, however, wasn't it?

A. I will admit it was limited. [371]

* * * * *

The Court: I can say to you that Defendants' A-1 to A-8 are admitted. They were admitted at the time they were first dealt with. A-9 has been admitted. I do not know of any exhibit that has been marked that has not been admitted, do you know, Mr. Clerk?

Clerk: No, Your Honor. All have been admitted according to my records now. [373] * * * * *

ORAL DECISION

The Court: In this case, from a preponderance of the evidence the Court is of the opinion and finds, concludes and decides as follows:

That this litigation has its background in a field of business enterprise having in it as leaders some of our nation's foremost, highest-minded, and most ethical businessmen, including Mr. Roberg and Mr. Turcotte of the defendant Puget Sound Pulp and Timber Company and others connected with that concern, and also including [375] the plaintiff in this case. It seems appropriate to comment, and to announce the Court's finding, in this further detail that I have heard a great many witnesses testify from the witness stand in this court, but I have never heard any one of them who impressed this Court more strongly by reason of their high sense of honor, business ethics, fair dealing, and common, every-day honesty than did the testimony of Mr. Roberg and Mr. Turcotte and the plaintiff Mr. O'Reilly.

We may wonder why men of such broad gauge as these would permit themselves to get into a dispute involving conditions, rights and obligations not admitted by them to be fully expressed in writing. We probably have here, however, about as good an example as we shall ever see of the high standard of mutual trust between businessmen like that between the old-fashioned Yankee businessmen. These men apparently dealt with each other in complete confidence among themselves that each would treat the other fairly not only in keeping with but

also wholly apart from their respective obligations and rights under written contracts.

However, nowadays it seems men worthy of that kind of trust and respect from each other are just as likely when they finally come to the parting of the ways to have a disagreement among themselves as are men motivated [376] by less high motives.

In this instance, these men, by coming into court, are doing nothing more than the average American citizen would do when dissatisfied with the conduct of another respecting their business relationship.

The plaintiff is looking to the law for relief, and neither the plaintiff nor the defendants in this action can be blamed or censured for submitting their contentions to this Court.

The plaintiff and this defendant company signed a written contract which is in evidence as Plaintiff's Exhibit 1, and that contract in paragraph (8) on page 3 thereof in writing stated, among other things, what the agency contract between them was to be in its terms, and the statement there in writing as to the contemplated agency contract terms, does not differ from the terms here proved by the evidence in this record.

You do not have to look any further for any written contract although it was contemplated that another future contract would be made. The detail as to what kind, however, is lacking concerning its form as being in writing or oral, but that written stipulation between these parties calls for the very same contract which the plaintiff contends became the contract of performance in this case. [377]

The plaintiff did not breach the conditions of paragraph (4) stated on the last sheet of paper contained in Plaintiff's Exhibit 3.

There was no valid accord and satisfaction entered into by and between these parties, because the defendant company neither did nor omitted to do any act or thing as to which it was not already obligated to do in consequence of any suggestion on plaintiff's part that he was in effect postponing the collection of one and one-half percent, in other words, one-half of his contracted commissions in this case. Nor did plaintiff thereafter lessen his efforts to perform his part of the agency contract.

The alleged accord and satisfaction is without any sufficient consideration in law necessary to make of it an accord and satisfaction with any legal effect.

The parties so far as accord and satisfaction and breach of contract by the plaintiff are concerned are left in the same position as they were in under and by virtue of the written contract in evidence as Plaintiff's Exhibit 1, and as explained by the unsigned writing in evidence as Plaintiff's Exhibit 3, which unsigned writing I understand from the evidence was treated by the parties on both sides in this litigation as the arrangement under which the parties operated in [378] pursuance of Plaintiff's Exhibit 1, although the parties did neither approve nor disapprove nor was it ever signed by the parties. Nevertheless, the Court must under the evidence accept it as an unsigned document properly admitted as evidence in this case and as binding on the parties.

The Court finds that plaintiff and defendants' predecessor in interest, Bellingham Paper Products Company, entered into a contract in writing whereby the defendant Puget Sound Pulp and Timber Company agreed to employ and to have employed the plaintiff as agent to sell the products of the paperboard mill of the Bellingham Paper Products Company for the period of five years commencing with the beginning of the manufacture of materials produced in the paperboard mill then to be erected by the Bellingham Paper Products Company on property leased from the defendant Puget Sound Pulp and Timber Company in Bellingham. Such sales agency was for the benefit of the plaintiff and Bellingham Paper Products Company, and later the rights and duties of the Bellingham Paper Products Company were transferred to and assumed by the defendant Puget Sound Pulp and Timber Company, which company is obligated in the place of Bellingham Paper Products Company in respect to all matters and things which originally were imposed [379] as duties and obligations upon such Bellingham Paper Products Company, and particularly is the defendant Puget Sound Pulp and Timber Company obligated to plaintiff in respect to the matters and things herein at issue.

The plaintiff did conform to all of the terms and conditions of said agency agreement; and the performance of such agency agreement became effective as of the month of May, 1947, and continued for the term thereof, namely, for five years thereafter.

The defendant wrongfully breached the terms and conditions of said agency contract which devolved originally upon the Bellingham Paper Products Company and were later transferred to an assumed by the defendant Puget Sound Pulp and Timber Company.

The plaintiff is entitled to recover off and from the defendant Puget Sound Pulp and Timber Company, a corporation, only in the total sum prayed for in plaintiff's first cause of action herein, namely, \$59,570.10.

Other issues in this case, if there are any to be determined, will be determined on the day when the Court will settle the Findings of Fact and Conclusions of Law and Judgment in this case.

Unless I am convinced later—and I am not ruling finally upon it now—that there is any kind of penalty [380] attached to the duties of the defendant, the Court would not be favorable to imposing any such penalty.

The successful party is entitled to receive at the Court's hands an award for taxable costs in addition to all other recoveries in this case.

The Court is considering continuing this case until August 15, 1955, for the purpose of settling and entering proper forms of Findings, Conclusions and Judgment, and I ask counsel to be here on that day at two o'clock in the afternoon.

I shall wish to have the opportunity of amending, correcting and in any way changing the expressions of the Court in connection with this orally an-

nounced decision, and I will not be able to give that attention until after this week. There will be some delay to counsel if anyone should ask for a transcript of the Court's oral decision. The decision is informally announced at this time primarily for the purpose of advising the litigants of the Court's decision, and it is not in any sense for the purpose of finally expressing the Court's reasons therefor.

Counsel and those connected with the case are excused until two o'clock in the afternoon on August 15th.

(At 12:15 o'clock, p.m., Monday, July 25, 1955, trial proceedings concluded.) [381]

* * * * *

[Endorsed]: Filed September 7, 1955.

[Endorsed]: No. 14906. United States Court of Appeals for the Ninth Circuit. Puget Sound Pulp and Timber Co., a corporation, and Lawson Turcotte, Appellants, vs. Joe A. O'Reilly, Appellee. Joe A. O'Reilly, Appellant, vs. Puget Sound Pulp and Timber Co., a corporation, and Lawson Turcotte, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: October 18, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14906

PUGET SOUND PULP AND TIMBER CO., a
corporation,

Appellant and Cross-Appellee,

vs.

JOE A. O'REILLY,

Appellee and Cross-Appellant.

APPELLANT'S STATEMENT OF POINTS

Comes Now the Appellant, Puget Sound Pulp and Timber Company and, pursuant to Rule 17(6), hereby states that it adopts the statement of points to be relied upon heretofore filed with the District Court and included as a part of the record on appeal submitted by the District Court to the Court of Appeals for the Ninth Circuit.

EVANS, McLAREN, LANE,

POWELL & BEEKS,

/s/ VAUGHN E. EVANS,

/s/ W. BYRON LANE,

Attorneys for Appellant, Puget
Sound Pulp and Timber Co.

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 21, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION RE USE OF ORIGINAL
EXHIBITS ON APPEAL

It Is Hereby Agreed and Stipulated by and between counsel for all parties to this appeal that an order may be entered directing that the original Exhibits may be considered by the Court in their original form without the necessity of the same being reproduced and printed in the Record on Appeal.

EVANS, McLAREN, LANE,
POWELL & BEEK,

/s/ VAUGHN E. EVANS,

Attorneys for Appellant and Cross-Appellee, Puget
Sound Pulp & Timber Company

RUMMENS, GRIFFIN, SHORT &
CRESSMAN and
MAX BERNBAUM,

/s/ KENNETH P. SHORT,

Attorneys for Appellee and Cross-Appellant, Joe A.
O'Reilly

[Endorsed]: Filed Oct. 21, 1955. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEE CROSS-APPELLANT'S STATE-
MENT OF POINTS

Appellee Cross-Appellant, Joe A. O'Reilly, hereby adopts the statement of points to be relied upon which he has heretofore filed with the District Court and included as part of the record heretofore submitted to the court by the District Court.

RUMMENS, GRIFFIN, SHORT &
CRESSMAN and
MAX BERNBAUM,

/s/ KENNETH P. SHORT,

Attorneys for Appellee Cross-
Appellant Joe A. O'Reilly

Acknowledgment of Service attached.

[Endorsed]: Filed Oct. 27, 1955. Paul P. O'Brien,
Clerk.